DOCKET

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Title: Allis-Chalmers Corporation, Petitioner
v.
Roderick S. Lueck

Docketed:
April 27, 1984

Court: Supreme Court of Wisconsin

Counsel for petitioner: Kammholz, Theophil C.

Counsel for respondent: Boisits, Gerald S.

Entry	Date	Note	Proceedings and Orders
1	Apr 27 1984	G	Petition for writ of certiorari filed.
2	May 25 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
4	May 29 1984		Order extending time to file response to petition unti June 13, 1984.
5	Jun 13 1984		Brief of respondent Lueck, Roderick S. in opposition filed
6	Jun 13 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Jun 20 1984		DISTRIBUTED. September 24, 1984
8	Oct 1 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
9	Oct 1 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Oct 1 1984		Petition GRANTED.
			**********
11	Oct 17 1984	G	Motion of respondent for appointment of counsel filed.
12	Oct 29 1984		DISTRIBUTED. Nov. 2, 1984.
13	Nov 5 1984		Motion for appointment of counsel GRANTED and it is ordered that Gerald S. Boisits, Esquire, of Milwaukee, Wisconsin, is appointed to serve as counsel for the respondent in this case.
14	Nov 15 1984		Joint appendix filed.
15	Nov 15 1984		Brief of petitioner Allis-Chalmers Corp. filed.
17	Nov 15 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
18	Nov 16 1984	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
19	Dec 3 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
20	Dec 3 1984		Motion of American Federation of Labor and Congress of Industrial GRANTED.
21	Dec 4 1984		SET FOR ARGUMENT. Wednesday, January 16, 1985. (4th case).
22	Dec 10 1984		CIRCULATED.
23	Dec 14 1984	X	Brief amicus curiae of Wisconsin and Hawaii filed.
24	Dec 15 1984	X	Brief of respondent Roderick S. Lueck filed.
25	Dec 17 1984		Record filed.
26	Jan 9 1985	X	Reply brief of petitioner Allis-Chalmers Corp. filed.
27	Jan 16 1985		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,

Petitioner,

vs.

RODERICK S. LUECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Whether federal labor law and policy under Section 301 of the Labor Management Relations Act preempts a tort action based on state law brought by a union employee against his employer for bad faith delay in making disability benefit payments when (1) the disability plan giving rise to benefits is embodied in a collective bargaining agreement and (2) the employee never used the contractual grievance procedure to seek redress.[1]

Petitioner, Allis-Chalmers Corporation, is the only parent corporation. The following are the only subsidiary or affiliate companies of Allis-Chalmers Corporation:

Lasco, Inc.
A-C Mexicana, S.A.
AFNE-Allis, S.A.
Japan Air Filter Co., Ltd.

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[1] Aetna Life & Casualty Company, administrator of the disability plan and a defendant below, is not a Petitioner herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,

Petitioner,

vs.

RODERICK S. LUECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin entered in this case on January 31, 1984.

OPINIONS BELOW

This Petition seeks review of a divided decision of the Supreme Court of the State of Wisconsin reported at 116 Wis.2d 559, 342 N.W.2d 699. It appears in Appendix A, *infra* (App. 1-20). The opinions of the Wisconsin Court of Appeals and the Circuit Court, Milwaukee County, Wisconsin are unpublished. They are set forth in Appendix B and C, *infra* (App. 21-27).

JURISDICTION

The decision of the Court below issued on January 31, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOKED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. § 185) provides in pertinent part as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

A majority of the Wisconsin Supreme Court held that Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), does not preempt a state court suit brought by a union employee against his employer alleging tortious bad faith in the administrative handling of his disability claim, even though his right to disability benefits derives entirely from a collective bargaining agreement providing an internal means of redress for all disability grievances (App. 5-11).

A.

The Facts

Allis-Chalmers and the International Union United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248 ("UAW") are parties to a collective bargaining agreement (App. 2, 28-29, 31) which incorporates by reference a negotiated group health and disability plan funded by Allis-Chalmers and administered by Aetna. This plan is not insured and is not required to be insured by the terms of the collective bargaining agreement. Disability benefits are provided for non-occupational illness and injury to all employees represented by the UAW (App. 2, 32). Respondent, Roderick S. Lueck (herein "Lueck"), was so represented (App. 2, 33).

The collective bargaining agreement and a related letter of understanding further provide that any issue or question arising under the disability plan is to be resolved in accordance with a three-step grievance procedure. Disability grievances are initiated by written submission to the Allis-Chalmers Employee Relations Department. Unresolved grievances next are presented in writing to a Joint Plant Insurance Committee composed of four employees, two selected by Allis-Chalmers and two chosen by the UAW from members of its bargaining committee. Lastly, unsettled disability grievances are taken to final and binding arbitration in accordance with provisions therefor established in the labor contract (App. 2, 32-33).

The present controversy arose in 1981 when Lueck suffered a non-work related injury. He notified Allis-Chalmers of it in accordance with the claims processing procedure and thereafter payments were initiated under the plan. Lueck

received all disability benefits due him. However, benefit payments were interrupted during some portion of his disability period (App. 2, 33).[2]

Instead of grieving under the contractually established grievance procedure, Lueck sued in the Circuit Court of Milwaukee County, Wisconsin. His complaint alleged that Aetna and Allis-Chalmers intentionally, contemptuously and repeatedly stopped disability payments under the negotiated disability plan which covered him as a UAW represented employee (App. 2). Lueck further alleged that as a result of Defendants' bad faith he incurred debts, great emotional distress, physical impairment, pain and suffering. Lueck sought $10,000 in compensatory and $300,000 in punitive damages (App. 2-3).

On February 1, 1982, Allis-Chalmers answered the complaint, denying the material factual allegations and also raising two affirmative defenses: first, that Lueck's state court claim was preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), and, second, that it was barred because Lueck never exhausted his contractual remedies before bringing suit. Aetna answered and pleaded similar defenses (App. 28-30).

On February 23, 1982, Allis-Chalmers moved for summary judgment on the defenses raised in its answer. An affidavit and exhibits were attached setting forth those provisions of the labor agreement which established Lueck's right to a disability benefit and which also made available to him the agreement's grievance and arbitration procedure (App. 3, 31-34). On February 26, 1982, Aetna moved for summary judgment on these bases and, additionally, on the ground that as a plan administrator it was not a fiduciary with respect to Lueck (App. 3).

[2] Although not clearly reflected in the record, the benefit payments were interrupted because of questions Allis-Chalmers had concerning the nature and extent of Lueck's condition.

On May 17, 1982, the Circuit Court granted summary judgment in favor of Allis-Chalmers and Aetna on the Section 301 defenses raised by them (App. 3, 26-27). The Wisconsin Court of Appeals affirmed on March 18, 1983 and also held that Aetna was not a fiduciary (App. 3-4, 21-25).

B.

The Wisconsin Supreme Court Decision

1. Majority Opinion

On January 31, 1984, the Wisconsin Supreme Court, with one judge dissenting, reversed the Court of Appeals. Relying on what it asserted were long-standing principles of state insurance law (App. 5-6, 11-12), the majority held that Lueck's complaint was not preempted by Section 301 of LMRA "even though the insurance contract is part of a labor agreement otherwise governed by federal labor law" (App. 16). By necessary implication the Court further held that Lueck's suit could be maintained although he never resorted to the contractually created disability grievance procedure. In the majority's view, this lawsuit was not one for breach of contract but rather a tort action for bad faith or oppressive handling of Lueck's disability insurance claim (App. 5-6, 9-10).

The Wisconsin Court also applied preemption standards developed in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and other decisions of this Court[3] which focus primarily on the relationship between state regulation and Sections 7 or 8 of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In this context, the Wisconsin Court ruled that while the administration of disability claim procedures under a

[3] *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978); *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954); and *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (App. 7-16).

collective bargaining agreement is a matter of only peripheral concern to federal labor policy (App. 8-11), it is of substantial significance to the State of Wisconsin which has a deeply rooted responsibility in assuring the prompt payment of disability claims (App. 5-6, 11-13).

2. Dissenting Opinion

The dissenting Justice rejected this analysis. He reasoned that since Lueck's lawsuit depended entirely on rights and obligations "created by labor contract *and would not exist absent such contract,* it must fall within the ambit of Sec. 301 of the Labor Management Relations Act (LMRA) which governs labor agreements" (App. 18, emphasis in original). Unlike the majority, which failed to address the issue expressly, the dissent further asserted that Lueck's cause of action was precluded by his failure to exhaust contractual remedies (App. 19). Finally, the dissent concluded that the mere existence of a state tort of bad faith is insufficient to override uniformity in the application of federal labor law (App. 19).

3. Finality of Decision

The Wisconsin Supreme Court's decision on the Section 301 preemption issue is the law of this case and final for the purposes of 28 U.S.C. § 1257. It "finally disposed of the federal preemption issue; a reversal here would terminate the state court action; and to permit the proceedings to go forward in the state court without resolving the preemption issue would involve a serious risk of eroding" federal labor policy. *Belknap, Inc.* v. *Hale,* ____ U.S. ____, 77 L.Ed.2d 798, 806 n.5 (1983).

REASONS FOR GRANTING THE WRIT

I.

THE WISCONSIN SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH FEDERAL LABOR LAW AND POLICY EXPRESSED IN SECTION 301, DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEAL.

For more than two decades it has been settled law that suits seeking to enforce rights created by collective bargaining agreements are governed by federal substantive law fashioned from national labor policy. *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 456 (1957), "[I]ncompatible doctrines of local law must give way to principles of federal labor law"; *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers* v. *Lucas Flour Company,* 369 U.S. 95, 102-03 (1962).

These decisions gave substantive content to Section 301. The Wisconsin Supreme Court's decision is completely at odds with them. By holding that a bad faith tort action may be maintained by a union employee against his employer on state insurance law principles but in total disregard of the collective bargaining agreement which created his rights to disability benefits and his access to the contractual means of redress, the Court below established a rule of local law which undermines preemption principles established by this Court in *Teamsters* v. *Lucas Flour, supra,* and *Smith* v. *Evening News Association,* 371 U.S. 195 (1962).

Here, as in both *Teamsters* and *Smith, supra,* the meaning and interpretation of the collective bargaining agreement ultimately is at the core of the dispute. No matter what Lueck's

action is labelled,[4] his suit inevitably involves issues of employee benefit eligibility and the propriety of employer (or agent) administration which can only be resolved by reference to the provisions of the negotiated agreement.

This is a classic Section 301 case. Lueck's bad faith tort claim, the unusual cause of action found by the Wisconsin Supreme Court majority, cannot exist in a contractual vacuum. Its eventual determination depends on an examination of negotiated contract language establishing employee rights to benefits.[5] Lueck's threshold right to a disability benefit at all as well as the manner of its payment must be determined by the contract. Yet the Court below declared the labor agreement legally "irrelevant to whether defendants exercised bad faith in the manner in which they handled Lueck's claim" (App. 6). In doing so, it overrode the language and purpose of Section 301 which, as interpreted by this Court, requires all the courts to develop and apply a consistent body of federal labor law in suits which arise from and seek enforcement of contract rights.

The Wisconsin Court's holding also is contrary to decisions of federal courts of appeal involving the preemptive effect of Section 301 on parallel state law claims. Thus, in *Avco Corp.* v. *Aero Lodge No. 735, Machinists,* 376 F.2d 337, 340 (6th Cir. 1967), *affirmed,* 390 U.S. 557 (1968), the Court of Appeals

[4] The denomination of a suit as one in tort cannot preclude preemption if the substance of the action is within the reach of Section 301. *Avco Corp.* v. *Aero Lodge No. 735, Machinists,* 376 F.2d 337 (6th Cir. 1967), *affirmed,* 390 U.S. 557 (1968); *Viestenz* v. *Fleming Companies, Inc.,* 681 F.2d 699 (10th Cir.) *cert. denied,* ____ U.S. ____, 74 L.Ed.2d 284, 103 S.Ct. 303 (1982); *Fristoe* v. *Reynolds Metals Co.,* 615 F.2d 1209 (9th Cir. 1980).

[5] A hypothetical example illustrates the central importance of the negotiated plan terms to this so-called tort. Thus, if the Agreement here provided that disability payments could be stopped at any time Allis-Chalmers reasonably believed a claimant was not disabled, that clause would have a direct, and indeed possibly a determinative, bearing on Lueck's right to assert tortious interruption of his benefit payments.

ruled that a common law contract action to enforce a no-strike clause in a labor agreement conflicted with Section 301. Similarly, the Courts of Appeal in *Fristoe* v. *Reynolds Metal Co.,* 615 F.2d 1209 (9th Cir. 1980), and *Viestenz* v. *Fleming Companies, Inc.,* 681 F. 2d 699 (10th Cir.), *cert. denied,* ____ U.S. ____, 74 L.Ed.2d 284, 103 S.Ct. 303 (1982), *inter alia* held that tortious claims of wrongful discharge, fraud and conspiracy are Section 301 claims because they relate to the administration and enforcement of employee rights under labor contracts. In each of these cases, contrary to the Wisconsin Supreme Court's rationale, the federal courts have ruled that substantive law under Section 301 simply does not permit ancillary state remedies when employee claims are grounded in collectively bargained agreements.

II.

THE WISCONSIN SUPREME COURT'S DECISION ERRONEOUSLY CONFUSES TWO DISCRETE PRINCIPLES OF PREEMPTION LAW.

The Wisconsin Court asserted that its conclusion actually is consistent with this Court's decisions (App. 7-15). It is not. The two convergent lines of authority the Court below relied upon to justify its surprising departure from Section 301 law are clearly distinguishable in fact and principle from this case.

First, its extensive citation and reliance on *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) (App. 7-8) is erroneous. The preemption at issue there was whether tortious interference with an employer's business by a picketing union is arguably protected or prohibited by Sections 7 or 8 of the NLRA (359 U.S. at 239). Here, the underlying issue involves questions of contract under a collectively bargained agreement. This is the stuff of Section 301, not the NLRA. That fundamental statutory distinction was first recognized by this Court in *Teamsters* v. *Lucas Flour Co., supra,*

where Justice Stewart said: "[s]ince this was a suit for violation of a collective bargaining contract within the purview of § 301(a) . . . the pre-emptive doctrine of cases such as . . . Garmon . . . based on the exclusive jurisdiction of the National Labor Relations Board, is not relevant. . . ." (369 U.S. at 102 n.9).

Second, the Wisconsin Court's further reliance on a related line of cases[6] which establish exceptions to preemption under Sections 7 or 8 of the NLRA is also incorrect. Without exception, the cases cited all involve torts (*e.g.*, trespass, libel, emotional distress and violence) which have nothing to do with the labor agreement. All involve conduct by the alleged tortfeasor against the injured party which stands entirely separate and apart from a labor contract. Indeed, in these cases this Court made clear that had the torts arisen in the context of activity regulated by federal labor law, it would have held them preempted. *See, e.g., Farmer* v. *Carpenters*, 430 U.S. 290, 305 ("Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle"); See also, *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 64-65; *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 199-207; *United Automobile Workers* v. *Russell*, 356 U.S. at 644; *United Construction Workers* v.

[6] *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978); *Farmer* v. *Carpenters*, 430 U.S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958); and *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954).

Laburnum Construction Co., 347 U.S. at 663-65. The tort asserted here is inseparably intertwined with the collective bargaining agreement, an area which is exclusively governed by principles of federal law under Section 301.

III.

THIS CASE PRESENTS IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS.

The Wisconsin Court's holding carries with it far-reaching implications affecting the fundamental purposes of national labor policy. Collective bargaining agreements cover many millions of workers and almost all contain internal grievance procedures for resolving disputes.[7] Nonetheless, under the reasoning of the Wisconsin Court, issues which go to the heart of contract administration may be separately litigated in state courts without either construing the terms of the bargaining agreement or looking to its grievance procedure for the final resolution of contract disputes.

The importance of the issue herein to the administration of national labor policy is plain. If Wisconsin is allowed independently to apply a bad faith tort erroneously drawn from its insurance law to alleged employer delays in making disability payments under a negotiated labor contract, other state courts may apply analogous tort theories with respect to a broad spectrum of other collective bargaining rights and obligations based on their own perceived interests. For example, one local jurisdiction may assert a deeply rooted concern in the fairness in which an employer effects discharge of discipline; another in

[7] D. Bok and J. Dunlop. *Labor and the American Community* (1970 Ed.) pp. 42, 57, 208.

the timeliness of wage, holiday or vacation payments.[8] Following the sophistic analysis of the Wisconsin Court, these state interests would be paramount, allowing for the terms of the labor agreement to be ignored or overridden. By the simple expedient of labelling a contract violation a common law tort, the Wisconsin Supreme Court articulated the rationale for the nullification of any labor agreement.

The Wisconsin decision frustrates significant national labor policy articulated by this Court first in *Teamsters* v. *Lucas Flour* and again in *Smith* v. *Evening News* and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Instead of uniformity in the application of federal law (*Teamsters* v. *Lucas Flour*, 369 U.S. at 103), a host of possibly conflicting legal principles would exist based on peculiar concerns of local law.[9] Rather than industrial peace and predictability, the central aim of collective bargaining endorsed by Congress and this Court, uncertainty will prevail as to both the meaning of contract terms and how those terms should be administered under federal and state laws (*Teamsters* v. *Lucas Flour*, 369 U.S. at 103).

Finally, the Wisconsin Court's decision deprives the employer and the union of the fruits of their bargaining over a fundamental term and condition of employment, contrary to both the policies and obligations of the National Labor

[8] Some states provide tort and contract remedies to non-union employees arbitrarily dismissed. See, *e.g.*, *Cleary* v. *American Airlines*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980) and *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980). Others regulate the payment of wage, vacation and holiday pay. See, *e.g.*, *Ill. Rev. Stat.* chap. 48, § 39m-1 *et seq.* These existing state policies easily could be invoked in the manner of the Wisconsin Court to create tort remedies for union employees independent of the governing terms of collective bargaining agreements.

[9] Such conflicts exist at the state level with respect to non-unionized employees. Thus, California recognizes a tort cause of action for bad faith breach of an employment contract, *see, e.g.*, *Cleary* v. *American Airlines*, *supra*. On the other hand, Illinois does not, *see, e.g.*, *Martin* v. *Federal Life Insurance Co.*, 109 Ill.App.3d 596, 440 N.E.2d 998 (1982).

Relations Act, *International Brotherhood of Teamsters, Local 24* v. *Oliver*, 358 U.S. 283, 296-97 (1959).[10] Cf., *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978). As a direct corollary, the decision below removes a basic underpinning of stable labor relations by allowing an employee to ignore the terms of the collective bargaining agreement and sue independently of the contract. This result divests the contracting parties "of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances" (*Republic Steel Corp.* v. *Maddox*, 379 U.S. at 653).

In sum, the Wisconsin Supreme Court's decision impermissibly and seriously intrudes on an area regulated by federal labor law, and undermines important policies embodied therein. It substitutes a parochial concern respecting local insurance law for the uniformity of federal law to be applied when labor contract rights are at issue. It allows lawsuits to replace the contractually established means of redress.

[10] *Oliver* struck down the direct application of Ohio's antitrust laws to a negotiated wage provision. In contrast, the Wisconsin Court relied on a tangential and attenuated local interest based on principles derived from its insurance law to justify regulation of a collectively bargained disability plan.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 27, 1984

APPENDIX

APPENDIX A

Filed: January 31, 1984
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin

No. 82-1041

STATE OF WISCONSIN

IN SUPREME COURT

Roderick S. Lueck,
Plaintiff-Appellant-Petitioner,

vs.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

WILLIAM G. CALLOW, J. This is a review of an unpublished decision of the court of appeals affirming a judgment of the circuit court for Milwaukee County, Judge Leah M. Lampone, granting summary judgment to the defendants and dismissing the plaintiff's complaint seeking damages in a bad faith tort action. We reverse the court of appeals and remand the matter for further proceedings consistent with this opinion.

The issues presented on appeal are as follows: (1) Does a union employee's cause of action for bad faith against his employer arise under section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185 (1976), thus requiring him to exhaust labor agreement remedies prior to instituting suit? (2) If an employee's bad faith claim arises under state law rather than the Labor Management Relations Act (LMRA), is the action nevertheless preempted by federal labor law? (3) Can

the employee bring a bad faith claim against the administrator of a disability insurance plan based on a labor agreement negotiated between his employer and his union?

The plaintiff, Roderick S. Lueck, was an employee of the Allis-Chalmers Corporation (A-C) and a member of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), which was the exclusive collective bargaining agent for Lueck and other A-C employees. Under the terms of the labor agreement between A-C and the UAW, A-C provided its employees with a group health and disability insurance plan. The union agreement also provided a grievance procedure to deal with disputes about insurance claims. Although A-C acted as a self-insurer for the insurance plan, it entered into a contract with the Aetna Life and Casualty Company to administer the plan. While Aetna was responsible for actually disbursing insurance payments, A-C provided the fund to pay benefits under the insurance plan, and A-C retained authority to approve all payments on individual claims.

On July 20, 1981, Lueck notified A-C that he had suffered a nonwork-related injury, and he requested disability benefits for the period he was unable to return to work. A-C began paying Lueck the disability benefits on July 20, 1981. The payments, for unexplained reasons, were repeatedly stopped and then reinstated during the period Lueck was absent from work. Ultimately, however, Lueck received all payments due him for his disability period.

On January 18, 1982, Lueck filed a complaint against A-C and Aetna. Lueck alleged that the defendants "intentionally, contemptuously, and repeatedly" failed to pay disability benefits which they had no reasonable basis for denying. Lueck further alleged that, as a result of the defendants' bad faith in dealing with his insurance claims, he incurred debts, great emotional distress, physical impairment, pain and suffering. Lueck sought $10,000 in compensatory damages and $300,000

in punitive damages. Lueck at no time filed a grievance under the grievance procedures provided by the union agreement to deal with insurance claim disputes.

On February 23, 1982, and February 26, 1982, A-C and Aetna, respectively, moved for summary judgment on the grounds that Lueck's claim was governed under or preempted by federal labor law. As a separate ground, Aetna also asserted that, as the administrator of A-C's insurance plan, it had no fiduciary duty to Lueck to deal in good faith on his disability claim and, therefore, could not be sued for bad faith. In response to Aetna's separate ground for its motion, Lueck's attorney filed an affidavit pursuant to sec. 802.08(4), Stats., stating that further discovery was needed to oppose Aetna's factual claim that it acted only as the administrator of the insurance plan.

After a hearing held on March 29, 1982, the circuit court granted the defendants' summary judgment motions. The court concluded that Lueck's action arose under section 301 of the LMRA, and therefore Lueck's remedy must be pursued under the labor agreement grievance procedure. The court also ruled that, even if Lueck's claim was not governed by section 301, a separate state tort claim was preempted by federal labor law. In reaching its decision, the trial court did not address Aetna's argument that no bad faith claim could be brought against it because it had no fiduciary duty to deal in good faith with Lueck's claim. The court on May 26, 1982, entered judgment dismissing Lueck's complaint on the merits and with prejudice.

Lueck appealed the judgment to the court of appeals. The court affirmed the judgment on two grounds. First, the court held that, because Aetna was merely the administrator of A-C's insurance plan, there existed between Lueck and Aetna no fiduciary relationship upon which to base a claim of bad faith against Aetna. Second, the court held that a state law claim for

bad faith against A-C was preempted by federal labor law. Lueck petitioned this court for review of the court of appeals' decision. We granted the petition for review on May 24, 1983.

The first issue we must decide is whether Lueck's bad faith claim is governed by section 301, 29 U.S.C. sec. 185 (1976),[1] of the LMRA. Section 301 provides a jurisdictional basis for any claim arising out of a violation of a contract between an employer and a labor organization. Federal labor law governs such claims, whether they are brought in state or federal co[illegible]. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Smith v. Evening N[illegible] Assn.*, 371 U.S. 195 (1962). However, before a section [illegible] action may be brought, the injured party must exhaust a[illegible] available contractual remedies, in this case the grievance procedure established to handle insurance claim disputes. *See Vaca*, 386 U.S. at 184; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

The defendants argue that Lueck's claim, even though denominated as state tort claim, is grounded in and inseparable from a breach of the labor contract. They argue that to find bad faith there must first be a determination that Lueck had certain rights under the contract and that those contractual rights were breached when the defendants disputed his disability claim. The defendants assert that such breaches of contract are precisely the type of claim section 301 covers. Consequently, they argue, Lueck's claim must be dismissed because it was conceded that Lueck did not exhaust his contractual remedies prior to instituting suit.

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[1] 29 U.S.C. sec. 185(a) (1976) reads, in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

We do not agree with the defendant's analysis of the nature of Lueck's claim. In *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W. 2d 368 (1978), we recognized that a bad faith claim may arise from an insurer's handling of an insured's claim under an insurance contract. We held that an insurance contract establishes a relationship between the insured and the insurer which places upon the insurer a good faith obligation to pay the reasonably undisputable claims of its insured. In establishing the precise nature of the bad faith claim, we emphasized that "the tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract." *Id.* at 687. We also noted that separate damages are recoverable for the tort of bad faith and for breach of the insurance contract.[2] *Id.* at 686.

Lueck's claim is not for a breach of contract; rather, it is a separate and independent claim arising out of the manner in which his disability claim was handled. For purposes of pursuing this claim, Lueck need only first establish that the defendants owed him a duty by virtue of the insurance contract. Even though that duty arose initially because of the insurance provided through the labor agreement, that fact alone does not persuade us that Lueck's claim is in essence a contractual

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[2] In *Anderson* we established that plaintiffs may recover for emotional distress only when there are other substantial damages aside from the emotional distress and the loss of the contract benefits and the emotional distress is severe. *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 695-96, 271 N.W. 2d 368 (1978). We also noted that punitive damages were appropriate only where there was "showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct." *Id.* at 697.

claim.[3] We disagree with the defendants' assertion that the bad faith claim is "inextricably intertwined" with the labor agreement. The specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim. We note in this regard that, under the rule of *Anderson*, Lueck would have to pursue a separate claim and remedy for any breach of contract. Lueck concedes that, if he were bringing only a breach of contract claim, it would be governed by section 301. We conclude, however, that Lueck's bad faith claim is not a labor contract dispute and, therefore, is not governed by section 301.[4]

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[3] We rejected a similar argument in *Coleman v. American Universal Insurance Co.*, 86 Wis. 2d 615, 273 N.W. 2d 220 (1979). In *Coleman* an injured employee brought a bad faith claim against a worker's compensation insurer and its agent. The defendants argued that, because the initial relationship between the insured and insurer arose under the worker's compensation statute, proceedings under that statute constituted his only remedy. We rejected this argument, holding that the bad faith claim was not based on the original work-related injury but, rather, was a separate claim resulting from the intentional acts of the insurer and its agent while investigating and paying the claim. Similarly, in this case, Lueck's claim is not based on a breach of the labor contract; rather, it is a separate claim based on the defendants' handling of his disability insurance.

[4] This finding is in accord with our decision in *Coleman, supra*, where we held that worker's compensation statute remedies did not govern a bad faith claim even though the claim was related to an injury falling under worker's compensation insurance coverage.

The next issue is whether Lueck's state law claim is nevertheless preempted by federal labor law. The general rule concerning federal labor law preemption of state law claims was stated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield.

". . . .

". . . When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

However, the Supreme Court has recognized that a rigid application of the *Garmon* preemption doctrine might adversely impact on legitimate state regulation of certain activities. The Court in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 118 (1978), stated:

"While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. As the Court noted last Term:

> " 'Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.' *Farmer v. Carpenters*, 430 U.S. 290, 302.

"Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion." (Footnotes omitted.)[5]

Recognizing this concern, the Supreme Court developed exceptions to the *Garmon* preemption test:

"'. . . We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' . . . We also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.'"

Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977) (citations omitted).

Applying the first part of the *Farmer* test, we conclude that the activity regulated by permitting bad faith suits would be "a merely peripheral concern of the Labor Management Relations Act." The defendants argue that the tortious conduct alleged by Lueck falls within the ambit of activity regulated under section 8(a)(5) and (d) of the National Labor Relations Act (NLRA), 29 U.S.C. sec. 158(a)(5) and (d) (1976).[6] The

[5] *See also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

[6] 29 U.S.C. secs. 158(a)(5) and (d) (1976) provide:

"(a). . .

"It shall be unfair labor practice for an employer—

". . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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defendants assert that these provisions of the NLRA impose upon the employer the duty to carry out in good faith the terms of a labor agreement. The failure of the employer to live up to its contract obligations is an unfair labor practice, which is actionable by an injured party under section 301. The defendants contend that Lueck's bad faith claim is in essence a claim that A-C failed to act in good faith in carrying out the terms of the labor agreement and, more specifically, the insurance contract provisions of that agreement. Thus, the defendants argue, Lueck's claim involves a central concern of the NLRA, namely, the duty of parties to a collective bargaining agreement to abide in good faith by the terms of the agreement.

We believe that the defendants have mischaracterized the nature of Lueck's claim. As we noted earlier, Lueck's claim is not for breach of the labor contract; his is a separate and independent claim arising from the manner in which his disability claim was handled. The latter type of activity is not, we conclude, specifically prohibited by the NLRA. The NLRA imposes a good faith obligation in following the terms of the labor contract and addresses only breaches of the labor contract itself; it does not prohibit the specific type of tortious conduct alleged by Lueck. Simply because the words "good faith" appear in the NLRA does not mean that the same conduct is

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". . . .

"(d). . .

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

regulated. Good faith in the labor agreement context means that parties must abide by the specific terms of the labor agreement; good faith in the insurance contract context means that the insurer has a separate duty to deal reasonably with its insured, as well as the duty to abide by the specific terms of the insurance contract.

We also note in regard to prohibited conduct that "[t]he critical inquiry . . . is . . . whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. at 197 (footnote omitted). Because the state bad faith claim in this case is not identical to a breach of contract claim, which would have to be brought pursuant to federal labor law, there is little risk of interference with the type of conduct arguably prohibited by section 8 of the NLRA.

We recognize that a bad faith claim could stem from a breach of contract. Although a breach of contract is not directly relevant to the determination of whether there was bad faith on the part of the insurer, there may be a breach underlying the tortious activities alleged by the plaintiff. In that situation conduct arguably covered by section 8(a)(5) and (d) would be at issue. However, we conclude that this would constitute only a minor aspect of the controversy because the breach itself is not dispositive of the central issue of bad faith. As the Supreme Court has recognized,

". . . Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the

Garmon rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers,* 382 U.S. 181."

Sears, Roebuck & Co. v. Carpenters, 436 U.S. at 189 n. 13. We conclude, therefore, that there is little risk that permitting the state cause of action to proceed will result in state regulation of conduct which Congress intended to prohibit through application of the NLRA.

Finally, the type of activity in question here, namely, the payment of disability claims under an insurance contract, is not a central aspect of labor relations. While we recognize that Lueck's claim may touch upon the terms of the labor agreement, it certainly will not implicate any activity, such as picketing, organizing, striking, and bargaining, which is at the heart of the NLRA. We note that in several cases the Supreme Court recognized exceptions to the *Garmon* doctrine even where the state tort claim arose out of an important labor activity. *See, e.g., Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (defamatory statements circulated in connection with a campaign to organize workers); *United Construction Workers v. Laburnum Corp.,* 347 U.S. 656 (1954) (threats and intimidation used during union organizing drive); *Automobile Workers v. Russell,* 356 U.S. 634 (1958) (mass picketing and threats of violence during a strike); *Sears, Roebuck & Co. v. Carpenters, supra,* (trespass by union pickets). We conclude that the regulation of the payment of disability claims under a labor agreement insurance plan is "a merely peripheral concern" of the LMRA.

The next part of the *Farmer* test involves inquiry into whether the complained of activity "touch[es] interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we [can]not infer that Congress had deprived the States of the power to act." *Garmon,* 359 U.S. at 244. In *Anderson* we noted that the

duty of an insurer to act as a fiduciary in adequately protecting the interests of its insureds had its origins in our opinion in *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1930, 1931). *Anderson*, 85 Wis. 2d at 687. Although *Anderson* was a fairly recent recognition[7] of the fiduciary duty to settle insureds' claims against their own insurance companies, the holding was consistent with this state's well-established tradition of regulating insurers' conduct toward their insureds. Implicit in our adoption of the tort of bad faith is the recognition that insureds must have a remedy for particularly oppressive treatment by their insurers; by giving insureds this remedy, we ensure that insurers will act reasonably toward their insureds or be answerable for any injuries they may cause. We believe that this state has a substantial interest in protecting its citizens from the kind of treatment which Lueck has alleged.[8] We conclude, therefore, that the regulation of relations between insurers and insureds is an interest deeply rooted in local feeling and responsibility. We also note that there is no compelling congressional direction that Congress has deprived this state of the power to regulate such activity. Although Congress through the NLRA has preempted state regulation of labor activities, we do not believe that Congress would, without comment, remove a means of judicial recourse for those injured by such tortious conduct,

[7] We note, however, that the Supreme Court's decisions permitting the exercise of state jurisdiction "have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens." *Farmer v. Carpenters*, 430 U.S. 290, 303 (1977).

[8] The tort of bad faith falls within the general type of intentional conduct which the Supreme Court has recognized as implicating compelling state interests. *See, e.g., Automobile Workers v. Russell*, 356 U.S. 634 (1958) and *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954) (protection against violence); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (protection of reputation); *Farmer v. Carpenters, supra* (freedom from mental distress); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (possession of real property).

even if a limited remedy were provided under the Act. *See United Construction Workers v. Laburnum Corp.*, 347 U.S. at 663-64. Accordingly, we find that the second part of the *Farmer* test is satisfied.

The third, and final, part of the *Farmer* test is the requirement that permitting the state action to proceed will not adversely impact on the effective administration of national labor policy. As we noted earlier, the proof necessary to establish the fiduciary relationship supporting a bad faith claim need only show the existence of an insurance contract, not any breach of that contract. We do not agree with the defendants' contention that inquiry into the existence of or terms of the insurance contract involves "interpretation" of the labor agreement, which is a function reserved to the National Labor Relations Board. Merely looking at the face of the insurance contract to establish its terms does not conflict with the Board's labor enforcement powers. Had Lueck brought a section 8 unfair labor practice claim, the Board's proceeding would focus on whether A-C lived up to the letter of the insurance contract, i.e., did A-C pay Lueck the money due him for his disability? Whether the way in which A-C carried out its actions constituted an intentional breach of a fiduciary duty would be of no relevance to the Board's performance of its contract enforcement functions. Moreover, the Board would have authority only to remedy the breach of contract by ordering A-C to pay Lueck his disability benefits, plus, perhaps, interest. The Board would lack the authority to compensate Lueck for physical injury, emotional distress, or other injuries,[9] or to award punitive damages where the insurer's conduct was particularly outrageous.

[9] *See e.g., Linn v. Plant Guard Workers, supra* at 64, where the Supreme Court held that a state law claim for malicious libel was not preempted by federal labor law and noted: "The

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Conversely, the state bad faith action would be unconcerned with whether A-C violated its labor agreement by breaching the insurance contract. We note in this regard that a bad faith action could be maintained even if no breach of insurance contract occurred. For example, an insurer could ultimately pay a claim, and thereby meet the terms of the insurance contract, but still have caused injury to its insured by unreasonably delaying payment of a legitimate and undisputable claim. In fact, it would appear that this set of events is what Lueck alleges occurred, because he did eventually receive all his disability benefits. The state claim can be adjudicated without needing to reach the "merits" of any underlying labor dispute. The state court need not consider, much less resolve, whether A-C violated its insurance contract—and, hence, its labor agreement—by disputing Lueck's disability claim. Finally, the state claim remedies would be for the insured's injuries

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Board's lack of concern with 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption."

The defendants argue that Lueck, as a union member, bargained away his right to seek a remedy for his bad faith claim. The defendants assert that the collective bargaining process contemplates giving up some rights in exchange for security and uniformity in treatment by employers pursuant to a labor agreement. While this is a valid point, we do not agree that collective bargaining necessarily means that employees surrender all their rights to legal redress for injury, except as provided by the labor agreement. To permit segments of this state's citizens to sign away their right to pursue a bad faith claim merely by being subject to a labor agreement would be an intolerable result. This is especially true where, as here, the legal right being pursued is not central to the collective bargaining agreement or the regulation of labor relations. We agree, however, that where specific disputes directly involve a labor agreement, the terms of the labor agreement and federal labor law will govern resolution of the issue.

as recognized in *Anderson;*[10] the state remedy would not involve enforcement of the terms of the labor agreement. Simply put, "[a]lthough the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same," *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. at 196-97, because they involve separate and independent claims and remedies.

We recognize that there is some risk that the state bad faith action could touch on federal enforcement of the labor agreement. A finding of bad faith could constitute the basis for an unfair labor practice claim. However, the Supreme Court in *Farmer* noted that the state action should not "threaten *undue* interference with the federal regulatory scheme." *Farmer,* 430 U.S. at 302 (emphasis added). We do not believe permitting a bad faith action to proceed will *unduly* interfere with the federal regulatory scheme. In the language of the Supreme Court, when "[v]iewed . . . in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304.

The Supreme Court cases in this area demonstrate that " the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies' of permitting the state court [action] to proceed." *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. at 189, citing *Vaca v. Sipes,* 386 U.S. 171, 180

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[10] The Supreme Court in *Farmer* noted that damages assessed for the state law tort claims should remain separate from any related federal law claim. *Farmer v. Carpenters,* 430 U.S. at 305 n. 13. Likewise, we caution that in this sort of case the jury should be instructed that it is to consider only the bad faith claim, not any alleged breach of contract claim, when determining the plaintiff's damages.

(1967).[11] We conclude that permitting Lueck to proceed with a state bad faith action will advance substantial state interests without interfering with the enforcement of national labor policies in the area of insurance contract arising from labor agreements. We hold that a state bad faith claim arising from an insurance contract may be brought even though the insurance contract is part of a labor agreement otherwise governed by federal labor law. The trial court erred in concluding that Lueck's bad faith claim was governed by federal labor law. Accordingly, we reverse the court of appeals and remand the case for trial.

The final issue is whether the court of appeals erred in finding that Aetna had no liability for bad faith because, as an administrator of the insurance contract, it had no fiduciary duty to act in good faith. By virtue of the contract between A-C and Aetna, Aetna became A-C's agent for purposes of administering A-C's insurance contract with Lueck. As an agent specifically hired to administer the insurance contract, Aetna is not "a stranger to the [insurance] contract and to the fiduciary relationship it signifies." *See Kranzush v. Badger State Mutual*

[11] The same general principle was recently stated by the Supreme Court in *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043 (U.S. Jan. 10, 1984) (No. 81-2159). In *Silkwood* the Court held that the plaintiff's award of punitive damages in a state court was not preempted by federal nuclear regulatory law. The Court noted that Congress, in passing legislation regulating the nuclear power industry, did not forbid the states from providing state law remedies for injuries suffered while working at federally regulated nuclear plants. As the Court stated, "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id.* at 4048. Although *Silkwood* is factually distinguishable from this case, we believe that the principle of protecting legitimate state interests from federal preemption, unless specifically supplanted or in direct conflict with federal law or policy, is equally applicable to this case.

Casualty Co., 103 Wis. 2d 56, 73, 307 N.W. 2d 256 (1981). As such, Aetna stands in the same relationship with Lueck as does A-C and, therefore, has the same fiduciary duty as the primary insurer.[12] We hold that, even though the ultimate authority to approve or disapprove the payment of a claim rests with the primary insurer, the administrator still may be held liable if, in the administration of the claim, the administrator independently engages in conduct actionable under the tort of bad faith.

Because we have concluded that a fiduciary relationship exists between Lueck and Aetna, the issue of Aetna's liability must be determined by its conduct in managing Lueck's claim. In this case Aetna moved for summary judgment, in part on the grounds that the record showed it did not play any active role in the management of Lueck's disability claim. The circuit court granted summary judgment in Aetna's favor, but did so on other grounds. The court of appeals, however, independently reached this issue, deciding that Aetna had no liability for bad faith. In light of the fact that the circuit court had made no findings or decision on this issue and the fact that the plaintiff had filed an affidavit claiming that he needed to engage in further discovery in order to oppose Aetna's motion, we conclude that the court of appeals erred in deciding this issue. We reverse the court of appeals and remand this issue to the circuit court for further consideration of Aetna's summary judgment motion and the plaintiff's request to be permitted further discovery.

By the Court—The decision of the court of appeals is reversed, and cause remanded for further proceedings consistent with this opinion.

[12] We emphasize that, even if Aetna is to be held liable along with A-C, Lueck has only one claim for bad faith against the defendants. He may not pursue separate actions against each defendant because each is jointly and severally liable for Lueck's damages arising from a single transaction or occurrence, namely, the handling of his disability claim.

Filed: January 31 1984
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin

No. 82-1041

STATE OF WISCONSIN

IN SUPREME COURT

Roderick S. Lueck,
Plaintiff-Appellant-Petitioner,

vs.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

STEINMETZ, J. (*Dissenting.*) I dissent from the result of the majority opinion and from its reasoning.

The bad faith claim in this case depends entirely on interpretation of the labor contract between the plaintiff, the union and Allis-Chalmers. In *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W. 2d 256 (1981), we held: "The insurer's duty of good faith and fair dealing arises from the insurance contract and runs to the insured. No such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies." The majority now abandons the holding in *Kranzush*. Because any duty allegedly violated by Allis-Chalmers in the present case was specifically created by the labor contract, *and would not exist absent* such contract, it must fall within the ambit of sec. 301 of the Labor Management Relations Act (LMRA), which governs labor agreements. Without the existence of the labor contract conferring disability benefits upon union members, there can be no action in this case based on a failure to pay such benefits. A finding of bad faith will necessarily be premised on a finding that a labor agreement, governed by federal law, has been violated. To do as the majority holds fragments federal labor law.

Section 301 of the LMRA provides the jurisdictional basis for any claim arising out of a contract between an employer and a labor organization. In addition to the right to maintain a sec. 301 action, an employee or union having a claim arising from a collective bargaining agreement, or believing that the employer has failed to honor the agreement in good faith, may file an unfair labor practice charge with the NLRB alleging a violation of the National Labor Relations Act (NLRA), 29 U.S.C. sec. 158(a)(5) and 158(d). Also, this plaintiff who asserts a claim arising from a labor contract has the choice of exhausting his contractual remedies and instituting a lawsuit or filing a charge with the appropriate administrative agency. In either event, he has a federal claim arising under federal labor law.

If the plaintiff seeks a claim under sec. 301, he must exhaust his contractual remedies before instituting court action. Plaintiff did not so exhaust his remedies.

If plaintiff's claim is not a federal claim under sec. 301, but rather is a state law claim, then there are overriding considerations of federal labor policy that would require its dismissal.

The bad faith violation this plaintiff is asserting depends entirely on the labor contract since his rights and remedies do not exist but for the contract. Because the activities of which plaintiff complains are of the type prohibited by the NLRA, any state cause of action based on such activity is preempted by federal labor law, since it is of major concern to such law and policy. The mere existence of a state tort of bad faith does not mean that the tort is deeply rooted in local feeling and responsibility or that the state's interest is necessarily greater than the interest in federal uniformity. There can be no finding of bad faith here without an antecedent finding that the underlying contract has been violated. It is this agreement which created the duty of good faith that plaintiff claims was violated, and it is this agreement that must be interpreted as the threshold issue.

For these reasons, I would affirm the decision of the court of appeals dismissing the complaint as to Allis-Chalmers Corporation. For the same reasons, I would affirm the court of appeals as to dismissal of the complaint as to Aetna Life and Casualty Company.

The majority has found as a matter of law that Aetna has a fiduciary relationship with Allis-Chalmers so that "Aetna stands in the same relationship with Lueck as does A-C and, therefore, has the same fiduciary duty as the primary insurer." (Slip op. at 16.) That holding by the majority on this inadequate factual record as to the relationship between Aetna and A-C is not possible. Even the plaintiff asked only for more discovery to determine fully the relationship between Aetna and A-C. In regard to Aetna, at the very least, the court should have remanded the case for further discovery.

I dissent.

APPENDIX B

Court of Appeals Decision
Dated and Released
March 18, 1983

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE: This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 82-1041

STATE OF WISCONSIN

IN COURT OF APPEALS

District I

Roderick S. Lueck,
Plaintiff-Appellant,

v.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county: LEAH M. LAMPONE, Judge. *Affirmed.*

Before Decker, C. J., Moser, P. J. and Wedemeyer, J.

WEDEMEYER, J. Roderick S. Lueck appeals from a summary judgment granted to the defendants, Aetna Life & Casualty Company (Aetna) and Allis-Chalmers Corporation (Allis-Chalmers). We affirm.

Lueck alleged in his complaint that the defendants in bad faith denied him benefits for disability resulting from a nonoccupational injury. The trial court granted Aetna and Allis-Chalmers summary judgment because Lueck's claim of

bad faith was governed by sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185, or alternatively, was preempted by federal labor law.

We determine that the judgment must be affirmed because the tort of bad faith is not applicable to Aetna under facts of this case and because the doctrine of federal preemption bars Lueck's bad faith claim against Allis-Chalmers.[1]

BAD FAITH

In *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978), our supreme court determined that an insured may assert a claim in tort against an insurer for the bad faith refusal to honor a claim of the insured. *Id.* at 680, 271 N.W.2d at 371. The next bad faith case was *Coleman v. American Universal Insurance Co.*, 86 Wis.2d 615, 273 N.W.2d 220 (1979), in which the supreme court held that where a worker's compensation insurer acts in bad faith in the settlement or payment of compensation benefits, a separate tort may be alleged and proved. *Id.* at 620, 273 N.W.2d at 221. The supreme court concluded in *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wis.2d 56, 307 N.W.2d 256 (1981), that a tort victim could not bring an action against the tortfeasor's insurer for bad faith in failing to settle the victim's claim. *Id.* at 57, 307 N.W.2d at 257. Lastly, this court decided in *Cornejo v. Polycon Industries*, 109 Wis.2d 649, 327 N.W.2d 183 (Ct.App. 1982), that a bad faith claim brought against an employer for

[1] Allis-Chalmers also argues that Lueck's claim must fail because it falls within the scope of sec. 301 of the Labor Management Relations Act. Section 301 provides that claims arising out of a collective bargaining agreement must apply federal labor law. Allis-Chalmers further argues that Lueck failed to exhaust his contractual remedies and therefore, that his bad faith claim should be barred. We need not decide these issues because we have decided that Lueck's bad faith claim is preempted by federal labor law.

refusing to rehire an employee injured in the course of his employment was not actionable. *Id.* at 651, 327 N.W.2d at 184. This court also stated in *Cornejo* that *Coleman* extended the scope of the tort of bad faith in worker's compensation cases only to the employer's insurer, not to the employer itself. *Id.* at 652, 327 N.W.2d at 184.

Here, Lueck alleges that his disability benefits were cut off several times without reason. Lueck's complaint specifically avers that Aetna and Allis-Chalmers committed the tort of bad faith.

It is undisputed that Aetna was hired by Allis-Chalmers to administer the insurance contract between Allis-Chalmers and the United Auto Workers (UAW). The UAW represented Lueck, among others, in negotiating this contract with Allis-Chalmers. The funds used to pay disability benefits were those of Allis-Chalmers. Only Allis-Chalmers had the ability to authorize or terminate benefits.

We determine that, under the circumstances of this case, a bad faith claim cannot be maintained against Aetna. Since Aetna was only hired to administer the insurance benefits of the contract between Allis-Chalmers and the UAW, the fiduciary relationship between insured and insurer, which triggers a good faith duty to settle claims, does not exist between Aetna and Lueck. *See Kranzush, supra,* 103 Wis.2d at 60-62, 307 N.W.2d at 259-60. Thus, a bad faith claim against Aetna may not be maintained.

FEDERAL PREEMPTION

Assuming that Allis-Chalmers has a fiduciary relationship with Lueck necessary to establish a bad faith claim, we determine that this state law claim is preempted by federal labor law. We therefore affirm the judgment of the trial court.

Both parties agree that the principle of preemption of state law claims by federal labor law was enunciated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

The Court in *Garmon* noted that, due to our federal system of government, states had power to regulate activity which was a mere peripheral concern of the Labor Management Relations Act, *id.* at 243, and states had jurisdiction of conduct which touched interests deeply rooted in local feeling and responsibility which Congress had not specifically decided to legislate. *See id.* at 244. State jurisdiction did not yield if the conduct complained of fit into either of these categories.

In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290 (1977), the Supreme Court determined that a complaint alleging a state tort of intentional infliction of emotional distress was not preempted by federal labor law. *See id.* at 302. We do not think *Farmer* is apposite to the present case.

Here, Allis-Chalmers's conduct toward Lueck arguably constitutes a § 8 unfair labor practice. We determine this because Allis-Chalmers's action may have been a refusal to perform under its contract with the UAW. *See* 29 U.S.C. § 158(5). We also determine that Allis-Chalmers's conduct is of more than a peripheral concern of the Labor Management Relations Act. Refusing to abide by a collective bargaining agreement is an utmost concern of the Act.

Lastly, this court determines that the bad faith claim of Lueck does not touch interests so deeply rooted in local feeling

and responsibility to allow it not to be preempted by federal labor law.

We make this last determination for the following reasons: This court believes that Congress intended to regulate conduct which, in essence, was a refusal to abide by a contract between union and management. The bad faith claim, while acknowledged since *Hilker v. Western Automobile Insurance Co.,* 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1931), is not of such a substantial interest to allow concurrent jurisdiction. We do not believe that *Farmer, supra,* mandates a conclusion that Lueck's claim is not preempted. Although both intentional infliction of emotional distress and bad faith are intentional torts, the claims are not so similar as to require that *Farmer, supra,* be precedent for this case. We further determine that, if this claim is preempted, it will affect the administration of federal labor policy. Again, we must draw attention to the point that Allis-Chalmers has arguably failed to abide by its contract with the UAW. Whether Allis-Chalmers failed to so do is a question that a court must answer if it were to hear Lueck's bad faith claim. We affirm.

By the Court.—Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

APPENDIX C

Filed May 17, 1982
Francis X McCormack, Clerk

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Roderick S. Lueck,

Plaintiff,

vs.

Aetna Life & Casualty Company and
Allis Chalmers Corporation,

Defendants.

ORDER FOR JUDGMENT
Case No. 573158

The above-entitled proceedings having come on for consideration before the Honorable Leah M. Lampone, Circuit Judge, presiding, on March 29, 1982; and appearances having been made by Gerald S. Boisits on behalf of Plaintiff, Robert C. Burrell on behalf of Defendant Aetna Life & Casualty Company, and Renee L. Johnson on behalf of Defendant Allis-Chalmers Corporation; and the Court, after receiving written and oral argument from the parties, having determined:

1. That Plaintiff's cause of action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185;

2. That Plaintiff is precluded from maintaining the present cause of action because he has failed to exhaust certain contractual remedies available to him under the grievance-arbitration procedure of the collective bargaining agreement and the letters of understanding negotiated by Defendant Allis-Chalmers Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248; and lml

3. That even if Plaintiff's cause of action were deemed to arise under state law instead of Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185, it would nevertheless be preempted by federal labor law;

NOW, THEREFORE,

IT IS HEREBY ORDERED that Defendants' motions for summary judgment be, and the same hereby are, granted, and that judgment be entered dismissing this action on its merits with prejudice, and with costs awarded to Defendants.

Dated this 17 day of May, 1982.

BY THE COURT:

/s/ LEAH M. LAPONE
Honorable Leah M. Lampone

APPENDIX D

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Roderick S. Lueck,

Plaintiff,

vs.

Aetna Life & Casualty Company and Allis-Chalmers Corporation,

Defendants.

ANSWER

Case No. 573158

NOW COMES Allis-Chalmers Corporation, Defendant in the above-entitled action, by its attorneys Stanley S. Jaspan and Renee L. Johnson, and as and for its Answer to Plaintiff's complaint herein admits, denies and alleges as follows:

• • •

AFFIRMATIVE DEFENSES

Further answering the complaint herein, Defendant Allis-Chalmers Corporation, as and for its first separate and affirmative defense, alleges and shows to the Court:

12. That neither the complaint nor any cause of action contained therein state a claim upon which relief can be granted.

Further answering the complaint herein, Defendant Allis-Chalmers Corporation, as and for its second separate and affirmative defense, alleges and shows the Court:

13. That the terms and conditions of Plaintiff's employment with Defendant Allis-Chalmers Corporation were governed by a collective bargaining agreement, a collectively bargained health and disability benefit agreement and collectively bargained letters of understanding between Defendant Allis-Chalmers Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248 (herein referred to as "UAW"), which agreements and letters of understanding were effective at all times material herein.

14. That said collective bargaining agreement recognizes the UAW as the exclusive collective bargaining agent for a collective bargaining unit of certain employees employed at the West Allis Plant of Defendant Allis-Chalmers Corporation, West Allis, Wisconsin, with certain specific exceptions; and that throughout the course of Plaintiff's employment with Defendant Allis-Chalmers Corporation, he was a member of the bargaining unit represented by the UAW.

15. That said collective bargaining agreement and said letters of understanding contain a grievance procedure providing the means by which an employee claiming a violation of the agreement or a dispute concerning the payment of insurance benefits under the collectively bargained insurance agreement may initiate proceedings, possibly including final and binding arbitration, to resolve such alleged violation or dispute.

16. That Plaintiff has failed to exhaust his remedies under the grievance procedures of the collective bargaining agreement and the letters of understanding, and has failed to allege that the UAW has breached its duty of fair representation in its handling of any contract violation or insurance claim dispute alleged by Plaintiff.

17. That by reason of the foregoing, Plaintiff is foreclosed from bringing this action against Defendant Allis-Chalmers Corporation.

Further answering the complaint herein, Defendant Allis-Chalmers Corporation, as and for its third separate and affirmative defense, alleges and shows to the Court:

18. That to the extent that Plaintiff's complaint attempts to set forth any claims based upon state law, such claims are preempted by federal labor law arising under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, or federal common law.

WHEREFORE, Defendant Allis-Chalmers Corporation prays that the complaint herein be dismissed, and that Defendant Allis-Chalmers Corporation be discharged without delay, recover its costs expended herein, including reasonable attorney's fees, and be granted such other and further relief to which it may be entitled.

Dated this 10th day of February, 1982.

STANLEY S. JASPAN
RENEE L. JOHNSON

By /s/ RENEE L. JOHNSON
Attorneys for Defendant
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APPENDIX E

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Roderick S. Lueck,
Plaintiff,

vs.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants.

AFFIDAVIT
Case No. 573158

AFFIDAVIT OF BRUCE N. PETTERSON AND DEFENDANT ALLIS-CHALMERS CORPORATION'S EXHIBITS 1, 2 AND 3 INCORPORATED THEREIN BY REFERENCE

The undersigned, Bruce N. Petterson, being first duly sworn on oath, deposes and says that:

1. I am employed by Allis-Chalmers Corporation, 1205 South 70th Street, West Allis, Wisconsin as Manager, Union Relations and Wage and Salary Administration. I have held this position since November 1, 1980. Such position has enabled me to become familiar with the collective bargaining agreements to which Allis-Chalmers is a party, and the grievance procedures thereunder. My position has also enabled me to become familiar with the facts and circumstances in this matter.

2. Allis-Chalmers Corporation negotiated a collective bargaining agreement, effective March 23, 1980 through November 1, 1982, with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248 (herein referred to as the "Contract"). Said Contract governs the terms and conditions

of employment of those employees of Allis-Chalmers Corporation who are members of Local 248.

3. Article VIII of the Contract contains a detailed grievance procedure whereby any employee may submit any grievance concerning his employment for resolution. If the grievance is not resolved after the third step of the grievance procedure, it may be submitted to binding arbitration before an impartial referee. The impartial referee generally has jurisdiction over any controversy concerning compliance with any provisions of the Contract. A true and correct copy of the Contract is attached hereto as Exhibit 1.

4. Article V, Section O of the Contract attached hereto as Exhibit 1, provides for health and disability benefits and states that the disability benefit plan negotiated by the parties is set forth as Exhibit F to the Contract. Exhibit F to the Contract has been printed in a booklet separate from the rest of the Contract. A true and correct copy of the separate booklet which is Exhibit F to the Contract is attached hereto as Exhibit 2.

5. The health and disability benefit plan set forth as Exhibit F to the Contract, which Exhibit is attached hereto as Exhibit 2, is funded by Allis-Chalmers Corporation. Aetna Life & Casualty Company acts as administrator of the plan.

6. Allis-Chalmers Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248 also negotiated certain Letters of Understanding which supplement the Contract attached hereto as Exhibit 1. These Letters of Understanding also govern the terms and conditions of employment of those employees who are members of Local 248. Letter No. 2, dated March 6, 1980, established a Joint Plant Insurance Committee composed of two Union-designated members and two members designated by Allis-Chalmers Corporation. The purpose of the Joint Plant Insurance Committee is to resolve

insurance-related issues with a minimum of delay and formality and at as early a stage as possible. An employee may initiate proceedings before the Joint Plant Insurance Committee by submitting a written request for review of his insurance claim or dispute to the Supervisor, Employee Relations or the Counselor, West Allis Employee Relations Services. If the claim is rejected or the dispute resolved against the employee at this level, said claim or dispute may be represented to the Joint Plant Insurance Committee. Letter of Understanding No. 2 provides that, should attempt at resolution of any insurance-related issue be unsuccessful at the Committee level, such issue may be presented for arbitration in the manner established under the Contract. A true and correct copy of Letter No. 2 of the Letters of Understanding is attached hereto as Exhibit 3.

7. Roderick S. Lueck was an hourly production employee of Allis-Chalmers Corporation from February 24, 1975 to January 29, 1982. During his employment with Allis-Chalmers Corporation, he was a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248. Said Union was the exclusive collective bargaining agent for Lueck, and Lueck's terms and conditions of employment were governed by the Contract, its Exhibits, and the Supplemental Letters of Understanding.

8. On July 20, 1981, Lueck notified Allis-Chalmers Corporation that he suffered a non-work related injury. Pursuant to the negotiated insurance provisions of the Contract, Lueck received disability benefits covering the period from July 20, 1981 to January 15, 1982.

9. Prior to institution of the lawsuit in the matter, Lueck had not filed a grievance under the Contract's grievance procedure concerning the payment of disability benefits or any other insurance-related issue. Prior to institution of the lawsuit in this matter, Lueck had not submitted a request for review of any disability benefit claim or any other insurance-related issue

to the Supervisor, Employee Relations, Counselor, West Allis Employee Relations Services, or the Joint Plant Insurance Committee for resolution either. Prior to institution of the lawsuit in this matter, no disability benefit claim or other insurance-related issue concerning Lueck had been processed to or through final and binding arbitration as provided for in the Contract and Letter of Understanding No. 2.

10. This affidavit is made in support of Defendant Allis-Chalmers Corporation's motion for summary judgment submitted in connection with the above-captioned matter.

Dated at West Allis, Wisconsin this 22nd day of February, 1982.

/s/ BRUCE N. PETTERSON
Bruce N. Petterson

Subscribed and sworn to before
me this 22nd day of February, 1982.

/s/ EUGENE D. MANTY
Notary Public, Milwaukee County,
Wisconsin

My Commission: Permanent

AMICUS CURIAE

BRIEF

MOTION FILED

MAY 25 1984

No. 83-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,
Petitioner,

v.

RODERICK S. LUECK,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

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ALLIS-CHALMERS CORPORATION,
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v.

RODERICK S. LUECK,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The Chamber of Commerce of the United States ("the Chamber") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari.[1]

1. The Chamber is the major national federation of business and professional organizations, consisting of

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[1] This motion is necessitated by the failure of the Respondent's attorney to respond to the Chamber's oral and written inquiries as to whether Respondent would consent to the filing of an *amicus curiae* brief in support of the Petition; Petitioner has given its consent to the filing of such a brief.

over 3,900 state and local chambers of commerce and trade and professional associations and a direct membership in excess of 200,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes an important aspect of the Chamber's activities and includes participation as *amicus curiae* in significant cases before this Court.

3. The question presented in this case is substantial and is of concern to the Chamber and its members. At issue is whether an employee can bypass the contractual grievance and arbitration procedures of a collective bargaining agreement and maintain an independent state tort action over an alleged failure to pay a given contractual benefit in a timely fashion. Resolution of this question is vital to the interpretation and application of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and significantly affects employees, employers and labor organizations throughout the country.

4. This Court has jealously guarded against state interference with respect to matters arising under Section 301 and has recognized that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company*, 369 U.S. 95, 104 (1962). The decision of the Wisconsin Supreme Court ignores the well-established body of law that has developed under Section 301 and concludes, despite the undisputed relationship of Roderick Lueck's claim to the collective bargaining agreement, that he may maintain a tort action for the alleged bad faith handling of his disability insurance claim. In so doing, the Wisconsin court directly ignores the prior holdings of this Court and removes some of the critical underpinnings of Section 301, at least in the state courts of Wisconsin. Necessarily, the ramifications of this case, both within and without the State of Wisconsin, will be significant to the Chamber's members. It is for this reason that the Chamber requests permission to submit its views.

WHEREFORE, the Chamber respectfully requests that its Motion be granted.

Respectfully submitted,

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May 25, 1984

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IN THE

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OCTOBER TERM, 1983

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On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File Brief as Amicus Curiae in Support of the Petition, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

In the guise of following decisions of this Court, albeit decisions which have no application to this case,[1] a

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[1] *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny.

divided Wisconsin Supreme Court has ignored longstanding principles of federal labor law and policy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.[2] In holding that employee Roderick Lueck may avoid the contractual grievance and arbitration procedures of a collective bargaining agreement [3] and pursue instead an independent state tort action over an alleged delay in payment of a disability benefit, when the plan giving rise to the benefit is a part of the labor contract, the Wisconsin Supreme Court severely undercut the national labor policy.[4] That policy is designed primarily to promote stable and uniform labor relations and to encourage parties to adopt their own dispute resolution procedures. By authorizing a separate state law claim based on a right created by a collective bargaining agreement, the Wisconsin Supreme Court has not only denigrated this policy but has ignored and emasculated the preemption doctrine which has evolved under Section

[2] In pertinent part, Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

[3] There is no dispute that the collective bargaining agreement contained a grievance and arbitration procedure, that controversies relating to the payment of benefits were subject to these procedures, and that Respondent never resorted to these procedures to resolve his claim. (App. 2, 32-33; App. 3, 31-34).

[4] Disputes relating to the payment of disability and similar benefits are routinely processed through grievance and arbitration procedures. *See Duriron Company, Inc.*, 80 Lab. Arb. (BNA) 859 (1983) (Rybolt, Arb.); *Caterpillar Tractor Co.*, 79 Lab. Arb. (BNA) 1070 (1982) (Cyrol, Arb.); *Cresco Manufacturing Co.*, 79 Lab. Arb. (BNA) 1220 (1982) (Cohen, Arb.); *Brockway Glass Company, Inc.*, 77 Lab. Arb. (BNA) 113 (1981) (Teple, Arb.).

301. Its holding permits an employee covered by a collective bargaining agreement to circumvent entirely a grievance and arbitration procedure established by a union and an employer for the resolution of disputes arising from the agreement simply by characterizing his action as a tort, rather than a contract, claim. Such a result endangers the continued existence of a uniform federal common law under Section 301 and offers to state courts opportunities to create conflicting causes of action which can only undermine the use of contractually prescribed dispute resolution procedures.

I. THE WISCONSIN SUPREME COURT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OF FEDERAL APPELLATE COURTS CONCERNING THE SCOPE OF PREEMPTION UNDER SECTION 301.

The Wisconsin Supreme Court refused to recognize that the claim advanced by Lueck in this action is a Section 301 claim.[5] Yet clearly it can be nothing else.

Section 301 governs the interpretation and enforcement of rights created by a collective bargaining agreement. *Smith v. Evening News Association*, 371 U.S. 195 (1962). "All rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce" arise under federal law. *Avco Corp. v. Aero Lodge No. 735, IAM*, 376 F.2d 337, 340 (6th Cir. 1967), *affirmed*, 390 U.S. 557 (1968). Thus, courts deciding these cases must apply federal substantive law, derived from national labor policy. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957). State law may be resorted to only if it is compatible

[5] As a result, the court analyzed this case under the preemption principles set out in *San Diego Building Trades Council v. Garmon, supra, Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977), and related cases. Such analysis has no place in a Section 301 case. *See Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company*, 369 U.S. 95 (1962).

with the purpose of Section 301, and any state law so applied "will be absorbed as federal law and [will] not be an independent source of rights." *Textile Workers Union, supra*, at 457.[6]

Preemption of state law not "absorbed" as federal law is essential to the goals of our national labor policy:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company, 369 U.S. 95, 104 (1962). The existence of possibly conflicting legal concepts would impede the process of negotiating collective bargaining agreements, would stimulate and prolong disputes, and would militate against the inclusion and/or utilization of grievance and arbitration provisions in a contract. *Id.* Therefore, "doctrines of federal labor law [are] uniformly to prevail over inconsistent local rules." *Id.*

The policy of federal preemption of state law in this context is so strong that even though Section 301 does not, on its face, give courts jurisdiction to determine the rights of individual employees under collective bargaining agreements, this Court has held that such suits must be brought under Section 301. *Smith v. Evening News Association, supra.* Only then is it assured that a uniform body of federal substantive law is developed. *Id.*[7]

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[6] It is the function of the Supreme Court "to resolve and accommodate . . . diversities" among the state and federal courts under one federal law. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962).

[7] The need for a "uniform body of federal substantive law" is no less applicable to disputes over health or retirement benefits. Thus, a retiree or individual formerly covered by a collective bargaining agreement has a federal remedy under Section 301 if his benefits are unilaterally changed. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971). The primacy of federal law in the benefit area is further demonstrated by the preemption of state regulation of benefit plans by the Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 *et seq.* *See also Shaw v. Delta Airlines, Inc.*, —— U.S. ——, 103 S. Ct. 2890 (1983).

If the existence of uniform federal labor law is to have any meaning, any claim Lueck has relating to the payment of disability benefits, including the manner of payment, must be resolved under Section 301 and not under state law. It is undisputed that Lueck is entitled to disability benefits only by virtue of negotiated contract language establishing employee rights to such benefits. Absent the collective bargaining agreement providing for disability benefits, Lueck would have no claim of any sort. It is therefore clear that regardless of the label given to Lueck's claim, the forum resolving it will be required to interpret portions of the collective bargaining agreement to determine the entitlement to payments and the appropriate manner of payment. Indeed, the Wisconsin court recognized the integration of Lueck's claim and the negotiated agreement when it noted that the duty owed Lueck by his employer—and upon which his state claim is grounded—"arises initially because of the insurance provided through the labor agreement." (App. 1, 5).

Despite its recognition that Lueck's claim had its origins in the collective bargaining agreement, and notwithstanding the preemption principles established by this Court for claims arising from collective bargaining agreements, the Wisconsin Court attempted to carve a niche for its own individualized and local rules on the ground that the state cause of action was in tort rather than in contract. Such a distinction places form over

substance. The critical question in determining preemption under Section 301 is *not* what the claim is denoted. It is whether the claim arose from the collective bargaining agreement. Here, the claim existed only because of the agreement. The court's refusal to accord any significance to this fact is wrong on its face. Its action undermines the concept of establishing a uniform body of law under Section 301 and should not be permitted.

The Wisconsin decision, in addition to being contrary to Section 301 preemption principles long established by this Court, is in conflict with decisions of the federal appellate courts regarding the effect of Section 301 on state law claims. Thus, in *Avco Corp. v. Aero Lodge No. 735, IAM*, *supra*, the Sixth Circuit held that a state contract action to enforce a no-strike clause in a labor agreement was preempted by Section 301 because "all rights and claims arising from a collective bargaining agreement" must be based upon a uniform federal law. 376 F.2d at 340. Such uniformity cannot be achieved where remedies for claims arising from collective bargaining agreements "are governed by state laws." *Id.* at 343.

Courts of appeals have also held that state tort claims based upon collective bargaining agreements are Section 301 claims, if they exist at all. For example, in *Wilkes-Barre Publishing Co. v. Newspaper Guild, Local 120*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), the court held a state claim for tortious interference with a collective bargaining agreement to be a Section 301 claim. The issue, according to the Third Circuit, is not "the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought . . . interpret a collective bargaining agreement." *Id.* at 380.[8]

[8] *See also Local 926, International Union of Operating Engineers v. Jones*, —— U.S. ——, 103 S. Ct. 1453 (1983).

Similarly, in *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209 (9th Cir. 1980) and *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982), the Courts of Appeals held that state tort claims of wrongful discharge, fraud and conspiracy were Section 301 claims because they were based upon the collective bargaining agreements.[9]

The conflict between these decisions and the Wisconsin court's opinion is plain. Allowing this holding to stand can only serve to encourage further intrusions into an area that Congress and this Court have held to be beyond state action.

II. THE WISCONSIN SUPREME COURT'S DECISION FRUSTRATES NATIONAL LABOR POLICY.

Of fundamental importance to our national labor policy is the peaceful resolution of disputes through grievance and arbitration procedures. *Republic Steel v. Maddox*, 379 U.S. 650 (1965).[10] This policy is significantly undermined by the decision below. It is therefore critical that the Court consider the propriety of the state court's action at this juncture.

Most collective bargaining agreements, like the one in issue here, contain grievance and arbitration procedures

[9] *See also Eitmann v. New Orleans Public Service, Inc.*, No. 82-3705 (5th Cir. April 23, 1984); *Dinger v. Anchor Motor Freight, Inc.*, 501 F. Supp. 64 (S.D.N.Y. 1980); *Atwood v. Pacific Maritime Association*, 432 F. Supp. 491 (D. Or. 1977), *affirmed*, 657 F.2d 1055 (9th Cir. 1981); *Lodge 743, IAM v. United Aircraft Corporation*, 190 F. Supp. 464 (D. Conn. 1961).

[10] *See also Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

as the exclusive vehicle for dispute resolution. Such procedures, unless specified as non-exclusive, must be exhausted before recourse to the court under Section 301 is had. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). Indeed, according to this Court, a rule allowing an employee to sidestep the grievance procedure in favor of a lawsuit would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 653, *quoting Teamsters v. Lucas Flour Company, supra.* If employees were permitted to file lawsuits without prior recourse to available contract remedies, "an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures" for certain types of claims or entirely. *Republic Steel v. Maddox, supra.* The Union would hardly favor such elimination, and labor peace would not be advanced by such a situation. *Id.*

The Wisconsin Supreme Court's holding seriously erodes *Republic Steel.* By granting an employee a separate and independent state tort cause of action for a claim arising from the collective bargaining agreement, the court has offered an employee two "bites of the apple."[11] Thus, an employee could process his claim through the contractually based grievance machinery, receive a negative result, and file a lawsuit based on the same allegedly improper conduct by the employer, so long as that suit sounded in tort. Indeed, under the Wisconsin decision, an employee could file a state tort claim seeking a

[11] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), and progeny are not to the contrary. These decisions hold that the exhaustion of contractual grievance and arbitration procedures is not required where federal statutory rights are involved. In contrast, this case involves a judicially created state law cause of action.

different remedy even if he *prevailed* in the grievance process. Clearly, in such a situation, an employer gains little by agreeing that such claims are subject to a grievance and arbitration procedure.

Further, the decision of the Wisconsin Supreme Court will, at the very least, subject employers who are currently parties to collective bargaining agreements which contain or incorporate by reference negotiated benefit plans[12] to lawsuits—similar to the case at bar—based upon the payment of benefits or the method of paying benefits under the negotiated plans. Indeed, in addition to the bad faith tort claim alleged here, employees could assert state causes of action for emotional distress based upon payment problems.

Such intrusions into the federal labor law would not necessarily be limited to suits relating to problems in the payment of disability benefits. States with parochial concerns involving other matters covered by collective bargaining agreements might also determine that state tort causes of action may be maintained. Thus, state courts could extrapolate from a bad faith tort in the insurance area an equivalent tort for an employer's errors or delays in awarding vacation, holiday or severance pay or in computing seniority.[13] Further, state courts may determine that an employee covered by a collective bargaining agreement has a tort cause of action for wrongful dis-

[12] According to The Bureau of National Affairs, Inc., more than 80% of collective bargaining agreements surveyed provide sickness, accident, hospitalization and surgical insurance benefits. *Collective Bargaining Negotiations and Contracts* (BNA), at 44:1 (1983). More than 60% of the analyzed plans provide major medical insurance and accidental death and dismemberment benefits. *Id.*

[13] Query whether the cancellation of an employee's expensive and long sought vacation by an employer for valid business reasons could form the basis for a state tort action for emotional distress or harassment?

charge.[14] Indeed, under the Wisconsin court's reasoning, in any area where a court concludes that the state has a localized interest, so long as a cause of action seeking to protect that interest sounds in tort, it is not barred by Section 301. Such reasoning can only disrupt the uniformity clearly intended by Congress and this Court in this area of law.

The impact on national labor policy of such state law exceptions to Section 301 is plain. An employer is denied the benefit of the bargain when it is forced to litigate in state court claims which it thought would be resolved under the grievance procedure. Moreover, a multi-state employer, whose employees are all covered by one national benefit plan, could, under the Wisconsin court's decision, have differing liabilities under the same contract provisions depending on the state in which the complaining employee is based. Similarly, employees covered by "master" contracts entered into by employers and unions could have different rights depending solely on the location of the facilities in which they work. Contract administration would thus be a welter of confusion. Uniform decisions would be the exceptions, rather than the rule.

In short, the Wisconsin decision constitutes a serious and improper foray into federal labor law and the national labor policy by one state with a narrow local interest. The uniformity of the federal labor law to be applied in matters arising from collective bargaining agreements is undermined. The possibility of intrusions by other states seeking to advance their own special in-

[14] Given the increase in litigation relating to the employment-at-will doctrine in most states, such speculation is not at all farfetched. *See, e.g., Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

terests is very real as a result of this case. Finally, by allowing state causes of action for matters arising from the contract between the parties, the court has rendered mandatory grievance procedures meaningless and thus deprived the parties of the benefits of their bargain.

CONCLUSION

For all of the foregoing reasons and for the additional reasons advanced in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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May 25, 1984

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
JUN 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,

Petitioner,

v.

RODERICK S. LUECK,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ALLIS-CHALMERS CORPORATION,
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to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO FILE
BRIEF IN FORMA PAUPERIS

RODERICK S. LUECK hereby moves, pursuant to Rule 46 of the Rules of this Court, for leave to file the attached Brief in Opposition to Petition for Certiorari and all following documents, if any, In Forma Pauperis.

AS GROUNDS THEREFORE, RODERICK S. LUECK refers to the attached Affidavit.

Respectfully Submitted,

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June 11, 1984

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-1748

ALLIS-CHALMERS CORPORATION,
Petitioner,

v.

RODERICK S. LUECK,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, RODERICK S. LUECK, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present are my responses and arguments to ALLIS-CHALMERS CORPORATION'S Petition For a Writ of Certiorari to the Supreme Court of Wisconsin.

I further swear that the following statements I have made below relating to my ability to pay the cost of my responses and arguments are true.

1. I am not presently employed. My last date of employment was April 29, 1983, at which time I was earning four hundred sixty-five and 60/100 ($465.60) dollars per week.

2. I have not received any money from the following sources within the past twelve (12) months:

a. Business profession or other form of self-employment;

b. Rent payments, interest or dividends;

c. Pensions, annuities or life insurance payments;

d. Gifts or inheritances; or

e. Any other sources.

3. I do not have any cash or money either personally or in a checking or savings account exceeding twenty-five and no/100 ($25.00) dollars.

4. I do not own any real estate, stocks, bonds, notes, or other valuable property, except for a 1975 Buick Station Wagon showing one hundred thirteen thousand (113,000) miles and having an estimated value of four hundred and no/100 ($400.00) dollars.

5. I have two (2) daughters, Paula and Laura, ages eleven (11) and ten (10) respectively, and am married to Barbara who is employed. I have made no monetary contributions to the support of the above-named.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Dated this 5th day of June, 1984.

Roderick S. Lusch

Subscribed and sworn to before
me this 5th day of June, 1984

Notary Public, State of Wisconsin
My Commission Expires 11/10/85.

QUESTION PRESENTED

Whether a union employee's cause of action in bad faith against his employer arises under Sec. 301 of the Labor Management Relations Act, thus requiring him to exhaust labor contract remedies negotiated between his union and his employer prior to instituting suit?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-1748

ALLIS-CHALMERS CORPORATION,
Petitioner,

v.

RODERICK S. LUECK,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

OPINIONS BELOW

The Respondent will refer to Appendix A, B, and C as stated in Petitioner's Brief (App. 1-27). A copy of same is attached, infra (App. 1-27).

OBJECTION TO AMICUS CURIAE

The Respondent has refused consent for amicus curiae filing.

STATEMENT OF THE CASE

A majority of the Wisconsin Supreme Court (one dissent) held that the provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), is not applicable to a union employee's tortious bad faith claim against his employer. The Court held that a union adopted insurance contract is only referred to in establishing the duty owed the employee, and that a specific violation of the contract is irrelevant to the issue of the employer's bad faith; a tort concerning only the manner in which the employer treated the employee, (App. 5 & 6).

The Facts

RODERICK S. LUECK (hereinafter "LUECK") had worked for ALLIS-CHALMERS CORPORATION (hereinafter "A-C") since February 25, 1975. As an employee of A-C, he was insured under an insurance policy maintained by A-C and administered by AETNA LIFE & CASUALTY COMPANY (hereinafter "AETNA") which, in part, insured LUECK against disability for non-occupational injury. LUECK was covered by this insurance at the time he was injured in a non-work related incident on July 19, 1981.[1]

LUECK applied for and received some disability payments under the above-mentioned policy when, for some unknown and unsubstantiated reason, either A-C and/or AETNA discontinued the benefits even though LUECK'S disability was supported by three (3) of A-C'S physicians and LUECK'S own physician. Further, A-C and/or AETNA attempted to send LUECK to yet a fourth (4th) evaluation by a physician known for delivering sparse or no disability findings on a regular basis on behalf of insurance companies.

LUECK commenced action in Milwaukee County Circuit Court on January 18, 1982, citing a cause of action for tortious bad faith in respect to the manner in which he was being treated by A-C and AETNA concerning his insurance benefits. Answers were filed by A-C and AETNA. Motions for Summary Judgment were filed by both defendants in February, 1982. They were granted on May 17, 1982, for two (2) reasons:

1. That LUECK'S cause of action falls under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. §185.
2. That even if LUECK'S cause of action was deemed to arise under state law instead of Sec. 301 of the Labor

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[1] AETNA is not a Petitioner herein.

Management Relations Act, 29 U.S.C. §185, it would nevertheless be pre-empted by federal labor law. (App. 26-27).

The Wisconsin Court of Appeals affirmed the Circuit Court alluding only to the Circuit Court's second reason concerning federal labor law preemption as promulgated by San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The Circuit Court's first reason concerning section 301 application was not considered by the Court of Appeals.

The Wisconsin Supreme Court reversed the Court of Appeals, resolving the two (2) basic issues in favor of LUECK, on January 31, 1984. (App. 1-4).

REASONS FOR DENYING THE WRIT

I.

THE WISCONSIN SUPREME COURT DECISION CLEARLY DELINEATES THE DIFFERENCE BETWEEN LUECK'S CLAIM FOR TORTIOUS BAD FAITH FROM ONE FALLING UNDER THE PURVIEW OF SECTION 301.

Wisconsin law has clearly recognized the basic distinction between a breach of contract and a breach of duty arising from contract. See Anderson v. Continental Insurance Company, 85 Wis.2d 675, 271 N.W.2d 368 (1978), and Coleman v. American Universal Insurance Company, 86 Wis.2d 615, 273 N.W.2d 220 (1979), (App. 5). As such, LUECK'S claim for tortious bad faith was separate and distinct from any claim that arose from his union contract.

The resulting doctrines embodied in the Wisconsin Court ruling are completely compatible with those arising under Section 301. LUECK is not seeking the recovery of disability benefits afforded him under his union contract. LUECK did subsequently and painstakingly receive those needed benefits. What LUECK seeks is redress for the intentional, contemptuous, and repeated manner in which those benefits were denied him. The negotiated contract clearly fails to indicate or to provide for

such redress. LUECK'S action was one not contemplated by the parties to the contract and, as a result, is free from it.

LUECK'S claim does not disregard the collective bargaining agreement; it compliments it. For his claim provides a means of insuring redress on the part of any union employee who has been wronged by his employer; not for failure of the employer to provide a bargain for benefit, but for the manner in which the employer handled the employee who sought such benefits. The Wisconsin Court recognized that the concerns presented by a claim charging bad faith were ones of local importance; one providing for and recognizing remedies on behalf of its citizens. (App. 8-13).

Had LUECK'S collective bargaining agreement recognized these concerns and provided remedies to satisfy the same, there would be no question that Section 301 prerequisites would apply. The bottom line is that LUECK'S union contract did not contemplate the wrongs and remedies LUECK now claims. The Wisconsin Supreme Court did.

II.

THE WISCONSIN SUPREME COURT CLEARLY RECOGNIZED THE DUAL PRINCIPLES OF PREEMPTION LAW.

Petitioner has further argued that the Wisconsin Court was in error in referring to San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). It must be emphasized that it was Petitioner who first noted the application of Garmon in its Motion for Summary Judgment and, in fact, convinced the Wisconsin Court of Appeals to rely upon Garmon in its decision to affirm dismissal of LUECK'S claim. (App. 24). Petitioner now claims the sole issue to be that involving Section 301. Petitioner's apparent confusion on the dual nature of federal preemption is not uncommon.

> [I]n referring to decision holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on

> federal protection of the conduct in question... from that based predominantly on the primary jurisdiction of the National Labor Relations Board..., although the two are often not easily separable. Railroad Trainman v. Jacksonville Terminal Co., 394 U.S. 369, 383 n. 19 (1969).

On the basis of this apparent confusion, Petitioner further argues the Wisconsin Supreme Court's apparent errors in citing a line of tort cases establishing exceptions to preemption under Section 7 or 8 of the NLRA.[2] Indeed, Petitioner argues that the torts involved had nothing to do with the labor contract and that the conduct involved stood entirely separate and apart from the labor agreement. This is exactly the point emphasized by LUECK and recognized by the Wisconsin Court. Tortious bad faith is a tort separate and apart from the labor agreement. Federal preemption has no application in respect to LUECK'S claim.

Petitioner also refers to Farmer v. Carpenters, 430 U.S. 290, 305 citing, "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle."

Petitioner refers to the foregoing in support of the argument that had the tort cases previously referred to arisen within the context of activity regulated by federal law, they would have been preempted. Tortious bad faith has not been held to have arisen under the context of federal law. In fact, the words of this Court as referred to above could clearly apply to LUECK'S claim:

> Management's breach of its collective bargaining agreement cannot itself form the underlying intentional, contemptuous, and repeated bad faith conduct; to hold otherwise would undermine the preemption principle.

The Wisconsin Supreme Court recognized this Court's words and ruled that it was not the Petitioner's breach of contract that supported LUECK'S claim, but rather the manner in which LUECK was treated that did so.

III.

THIS CASE WAS CLEARLY ARTICULATED BY THE WISCONSIN SUPREME COURT.

The Wisconsin decision implicates no employer who has exercised the foresight and goodwill to insure, within a collectively bargained for agreement, that an employee will be entitled to proper redress for the intentional and reckless handling of his union benefits. Had LUECK'S union contract contained such provisions, his remedies would have been sought pursuant to those provisions. (App. 5-6). Unfortunately, this was not the case. Legal action was necessary.

In order to seek redress under the provisions of a labor contract, there must be provisions under which to do so. This is what the decision of the Wisconsin Supreme Court says; no more, no less.

CONCLUSION

On the basis of the foregoing, LUECK requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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June 11, 1984

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[2] Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978); Farmer v. Carpenters, 430 U.S. 290 (1977); Linn v. Plant Guard Workers, 383 U.S. 53 (1966); United Automobile Workers v. Russell, 356 U.S. 634 (1958); and United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954).

APPENDIX

APPENDIX A

Filed: January 31, 1984
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin
No. 82-1041

STATE OF WISCONSIN

IN SUPREME COURT

Roderick S. Lueck,
Plaintiff-Appellant-Petitioner,

vs.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

WILLIAM G. CALLOW, J. This is a review of an unpublished decision of the court of appeals affirming a judgment of the circuit court for Milwaukee County, Judge Leah M. Lampone, granting summary judgment to the defendants and dismissing the plaintiff's complaint seeking damages in a bad faith tort action. We reverse the court of appeals and remand the matter for further proceedings consistent with this opinion.

The issues presented on appeal are as follows: (1) Does a union employee's cause of action for bad faith against his employer arise under section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185 (1976), thus requiring him to exhaust labor agreement remedies prior to instituting suit? (2) If an employee's bad faith claim arises under state law rather than the Labor Management Relations Act (LMRA), is the action nevertheless preempted by federal labor law? (3) Can

the employee bring a bad faith claim against the administrator of a disability insurance plan based on a labor agreement negotiated between his employer and his union?

The plaintiff, Roderick S. Lueck, was an employee of the Allis-Chalmers Corporation (A-C) and a member of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), which was the exclusive collective bargaining agent for Lueck and other A-C employees. Under the terms of the labor agreement between A-C and the UAW, A-C provided its employees with a group health and disability insurance plan. The union agreement also provided a grievance procedure to deal with disputes about insurance claims. Although A-C acted as a self-insurer for the insurance plan, it entered into a contract with the Aetna Life and Casualty Company to administer the plan. While Aetna was responsible for actually disbursing insurance payments, A-C provided the fund to pay benefits under the insurance plan, and A-C retained authority to approve all payments on individual claims.

On July 20, 1981, Lueck notified A-C that he had suffered a nonwork-related injury, and he requested disability benefits for the period he was unable to return to work. A-C began paying Lueck the disability benefits on July 20, 1981. The payments, for unexplained reasons, were repeatedly stopped and then reinstated during the period Lueck was absent from work. Ultimately, however, Lueck received all payments due him for his disability period.

On January 18, 1982, Lueck filed a complaint against A-C and Aetna. Lueck alleged that the defendants "intentionally, contemptuously, and repeatedly" failed to pay disability benefits which they had no reasonable basis for denying. Lueck further alleged that, as a result of the defendants' bad faith in dealing with his insurance claims, he incurred debts, great emotional distress, physical impairment, pain and suffering. Lueck sought $10,000 in compensatory damages and $300,000

in punitive damages. Lueck at no time filed a grievance under the grievance procedures provided by the union agreement to deal with insurance claim disputes.

On February 23, 1982, and February 26, 1982, A-C and Aetna, respectively, moved for summary judgment on the grounds that Lueck's claim was governed under or preempted by federal labor law. As a separate ground, Aetna also asserted that, as the administrator of A-C's insurance plan, it had no fiduciary duty to Lueck to deal in good faith on his disability claim and, therefore, could not be sued for bad faith. In response to Aetna's separate ground for its motion, Lueck's attorney filed an affidavit pursuant to sec. 802.08(4), Stats., stating that further discovery was needed to oppose Aetna's factual claim that it acted only as the administrator of the insurance plan.

After a hearing held on March 29, 1982, the circuit court granted the defendants' summary judgment motions. The court concluded that Lueck's action arose under section 301 of the LMRA, and therefore Lueck's remedy must be pursued under the labor agreement grievance procedure. The court also ruled that, even if Lueck's claim was not governed by section 301, a separate state tort claim was preempted by federal labor law. In reaching its decision, the trial court did not address Aetna's argument that no bad faith claim could be brought against it because it had no fiduciary duty to deal in good faith with Lueck's claim. The court on May 26, 1982, entered judgment dismissing Lueck's complaint on the merits and with prejudice.

Lueck appealed the judgment to the court of appeals. The court affirmed the judgment on two grounds. First, the court held that, because Aetna was merely the administrator of A-C's insurance plan, there existed between Lueck and Aetna no fiduciary relationship upon which to base a claim of bad faith against Aetna. Second, the court held that a state law claim for

bad faith against A-C was preempted by federal labor law. Lueck petitioned this court for review of the court of appeals' decision. We granted the petition for review on May 24, 1983.

The first issue we must decide is whether Lueck's bad faith claim is governed by section 301, 29 U.S.C. sec. 185 (1976),[1] of the LMRA. Section 301 provides a jurisdictional basis for any claim arising out of a violation of a contract between an employer and a labor organization. Federal labor law governs such claims, whether they are brought in state or federal court. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). However, before a section 301 action may be brought, the injured party must exhaust all available contractual remedies, in this case the grievance procedure established to handle insurance claim disputes. *See Vaca*, 386 U.S. at 184; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

The defendants argue that Lueck's claim, even though denominated as state tort claim, is grounded in and inseparable from a breach of the labor contract. They argue that to find bad faith there must first be a determination that Lueck had certain rights under the contract and that those contractual rights were breached when the defendants disputed his disability claim. The defendants assert that such breaches of contract are precisely the type of claim section 301 covers. Consequently, they argue, Lueck's claim must be dismissed because it was conceded that Lueck did not exhaust his contractual remedies prior to instituting suit.

[1] 29 U.S.C. sec. 185(a) (1976) reads, in relevant part:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

We do not agree with the defendant's analysis of the nature of Lueck's claim. In *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W. 2d 368 (1978), we recognized that a bad faith claim may arise from an insurer's handling of an insured's claim under an insurance contract. We held that an insurance contract establishes a relationship between the insured and the insurer which places upon the insurer a good faith obligation to pay the reasonably undisputable claims of its insured. In establishing the precise nature of the bad faith claim, we emphasized that "the tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract." *Id.* at 687. We also noted that separate damages are recoverable for the tort of bad faith and for breach of the insurance contract.[2] *Id.* at 686.

Lueck's claim is not for a breach of contract; rather, it is a separate and independent claim arising out of the manner in which his disability claim was handled. For purposes of pursuing this claim, Lueck need only first establish that the defendants owed him a duty by virtue of the insurance contract. Even though that duty arose initially because of the insurance provided through the labor agreement, that fact alone does not persuade us that Lueck's claim is in essence a contractual

[2] In *Anderson* we established that plaintiffs may recover for emotional distress only when there are other substantial damages aside from the emotional distress and the loss of the contract benefits and the emotional distress is severe. *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 695-96, 271 N.W. 2d 368 (1978). We also noted that punitive damages were appropriate only where there was "showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct." *Id.* at 697.

claim.[3] We disagree with the defendants' assertion that the bad faith claim is "inextricably intertwined" with the labor agreement. The specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim. We note in this regard that, under the rule of *Anderson*, Lueck would have to pursue a separate claim and remedy for any breach of contract. Lueck concedes that, if he were bringing only a breach of contract claim, it would be governed by section 301. We conclude, however, that Lueck's bad faith claim is not a labor contract dispute and, therefore, is not governed by section 301.[4]

[3] We rejected a similar argument in *Coleman v. American Universal Insurance Co.*, 86 Wis. 2d 615, 273 N.W. 2d 220 (1979). In *Coleman* an injured employee brought a bad faith claim against a worker's compensation insurer and its agent. The defendants argued that, because the initial relationship between the insured and insurer arose under the worker's compensation statute, proceedings under that statute constituted his only remedy. We rejected this argument, holding that the bad faith claim was not based on the original work-related injury but, rather, was a separate claim resulting from the intentional acts of the insurer and its agent while investigating and paying the claim. Similarly, in this case, Lueck's claim is not based on a breach of the labor contract; rather, it is a separate claim based on the defendants' handling of his disability insurance.

[4] This finding is in accord with our decision in *Coleman, supra*, where we held that worker's compensation statute remedies did not govern a bad faith claim even though the claim was related to an injury falling under worker's compensation insurance coverage.

The next issue is whether Lueck's state law claim is nevertheless preempted by federal labor law. The general rule concerning federal labor law preemption of state law claims was stated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield.

". . . .

". . . When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

However, the Supreme Court has recognized that a rigid application of the *Garmon* preemption doctrine might adversely impact on legitimate state regulation of certain activities. The Court in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 118 (1978), stated:

"While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. As the Court noted last Term:

> " 'Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.' *Farmer v. Carpenters*, 430 U.S. 290, 302.

"Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion." (Footnotes omitted.)[5]

Recognizing this concern, the Supreme Court developed exceptions to the *Garmon* preemption test:

"... We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the Labor Management Relations Act ... [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' ... We also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' "

Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977) (citations omitted).

Applying the first part of the *Farmer* test, we conclude that the activity regulated by permitting bad faith suits would be "a merely peripheral concern of the Labor Management Relations Act." The defendants argue that the tortious conduct alleged by Lueck falls within the ambit of activity regulated under section 8(a)(5) and (d) of the National Labor Relations Act (NLRA), 29 U.S.C. sec. 158(a)(5) and (d) (1976).[6] The

[5] *See also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

[6] 29 U.S.C. secs. 158(a)(5) and (d) (1976) provide:

"(a)...

"It shall be unfair labor practice for an employer—

"....

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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defendants assert that these provisions of the NLRA impose upon the employer the duty to carry out in good faith the terms of a labor agreement. The failure of the employer to live up to its contract obligations is an unfair labor practice, which is actionable by an injured party under section 301. The defendants contend that Lueck's bad faith claim is in essence a claim that A-C failed to act in good faith in carrying out the terms of the labor agreement and, more specifically, the insurance contract provisions of that agreement. Thus, the defendants argue, Lueck's claim involves a central concern of the NLRA, namely, the duty of parties to a collective bargaining agreement to abide in good faith by the terms of the agreement.

We believe that the defendants have mischaracterized the nature of Lueck's claim. As we noted earlier, Lueck's claim is not for breach of the labor contract; his is a separate and independent claim arising from the manner in which his disability claim was handled. The latter type of activity is not, we conclude, specifically prohibited by the NLRA. The NLRA imposes a good faith obligation in following the terms of the labor contract and addresses only breaches of the labor contract itself; it does not prohibit the specific type of tortious conduct alleged by Lueck. Simply because the words "good faith" appear in the NLRA does not mean that the same conduct is

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"....

"(d)...

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

regulated. Good faith in the labor agreement context means that parties must abide by the specific terms of the labor agreement; good faith in the insurance contract context means that the insurer has a separate duty to deal reasonably with its insured, as well as the duty to abide by the specific terms of the insurance contract.

We also note in regard to prohibited conduct that "[t]he critical inquiry ... is ... whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. at 197 (footnote omitted). Because the state bad faith claim in this case is not identical to a breach of contract claim, which would have to be brought pursuant to federal labor law, there is little risk of interference with the type of conduct arguably prohibited by section 8 of the NLRA.

We recognize that a bad faith claim could stem from a breach of contract. Although a breach of contract is not directly relevant to the determination of whether there was bad faith on the part of the insurer, there may be a breach underlying the tortious activities alleged by the plaintiff. In that situation conduct arguably covered by section 8(a)(5) and (d) would be at issue. However, we conclude that this would constitute only a minor aspect of the controversy because the breach itself is not dispositive of the central issue of bad faith. As the Supreme Court has recognized,

"... Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the

Garmon rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181."

Sears, Roebuck & Co. v. Carpenters, 436 U.S. at 189 n. 13. We conclude, therefore, that there is little risk that permitting the state cause of action to proceed will result in state regulation of conduct which Congress intended to prohibit through application of the NLRA.

Finally, the type of activity in question here, namely, the payment of disability claims under an insurance contract, is not a central aspect of labor relations. While we recognize that Lueck's claim may touch upon the terms of the labor agreement, it certainly will not implicate any activity, such as picketing, organizing, striking, and bargaining, which is at the heart of the NLRA. We note that in several cases the Supreme Court recognized exceptions to the *Garmon* doctrine even where the state tort claim arose out of an important labor activity. *See, e.g., Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (defamatory statements circulated in connection with a campaign to organize workers); *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954) (threats and intimidation used during union organizing drive); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence during a strike); *Sears, Roebuck & Co. v. Carpenters, supra*, (trespass by union pickets). We conclude that the regulation of the payment of disability claims under a labor agreement insurance plan is "a merely peripheral concern" of the LMRA.

The next part of the *Farmer* test involves inquiry into whether the complained of activity "touch[es] interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we [can]not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. In *Anderson* we noted that the

duty of an insurer to act as a fiduciary in adequately protecting the interests of its insureds had its origins in our opinion in *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1930, 1931). *Anderson*, 85 Wis. 2d at 687. Although *Anderson* was a fairly recent recognition[7] of the fiduciary duty to settle insureds' claims against their own insurance companies, the holding was consistent with this state's well-established tradition of regulating insurers' conduct toward their insureds. Implicit in our adoption of the tort of bad faith is the recognition that insureds must have a remedy for particularly oppressive treatment by their insurers; by giving insureds this remedy, we ensure that insurers will act reasonably toward their insureds or be answerable for any injuries they may cause. We believe that this state has a substantial interest in protecting its citizens from the kind of treatment which Lueck has alleged.[8] We conclude, therefore, that the regulation of relations between insurers and insureds is an interest deeply rooted in local feeling and responsibility. We also note that there is no compelling congressional direction that Congress has deprived this state of the power to regulate such activity. Although Congress through the NLRA has preempted state regulation of labor activities, we do not believe that Congress would, without comment, remove a means of judicial recourse for those injured by such tortious conduct,

[7] We note, however, that the Supreme Court's decisions permitting the exercise of state jurisdiction "have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens." *Farmer v. Carpenters*, 430 U.S. 290, 303 (1977).

[8] The tort of bad faith falls within the general type of intentional conduct which the Supreme Court has recognized as implicating compelling state interests. *See, e.g., Automobile Workers v. Russell*, 356 U.S. 634 (1958) and *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954) (protection against violence); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (protection of reputation); *Farmer v. Carpenters*, *supra* (freedom from mental distress); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (possession of real property).

even if a limited remedy were provided under the Act. *See United Construction Workers v. Laburnum Corp.*, 347 U.S. at 663-64. Accordingly, we find that the second part of the *Farmer* test is satisfied.

The third, and final, part of the *Farmer* test is the requirement that permitting the state action to proceed will not adversely impact on the effective administration of national labor policy. As we noted earlier, the proof necessary to establish the fiduciary relationship supporting a bad faith claim need only show the existence of an insurance contract, not any breach of that contract. We do not agree with the defendants' contention that inquiry into the existence of or terms of the insurance contract involves "interpretation" of the labor agreement, which is a function reserved to the National Labor Relations Board. Merely looking at the face of the insurance contract to establish its terms does not conflict with the Board's labor enforcement powers. Had Lueck brought a section 8 unfair labor practice claim, the Board's proceeding would focus on whether A-C lived up to the letter of the insurance contract, i.e., did A-C pay Lueck the money due him for his disability? Whether the way in which A-C carried out its actions constituted an intentional breach of a fiduciary duty would be of no relevance to the Board's performance of its contract enforcement functions. Moreover, the Board would have authority only to remedy the breach of contract by ordering A-C to pay Lueck his disability benefits, plus, perhaps, interest. The Board would lack the authority to compensate Lueck for physical injury, emotional distress, or other injuries,[9] or to award punitive damages where the insurer's conduct was particularly outrageous.

[9] *See e.g., Linn v. Plant Guard Workers*, *supra* at 64, where the Supreme Court held that a state law claim for malicious libel was not preempted by federal labor law and noted: "The

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Conversely, the state bad faith action would be unconcerned with whether A-C violated its labor agreement by breaching the insurance contract. We note in this regard that a bad faith action could be maintained even if no breach of insurance contract occurred. For example, an insurer could ultimately pay a claim, and thereby meet the terms of the insurance contract, but still have caused injury to its insured by unreasonably delaying payment of a legitimate and undisputable claim. In fact, it would appear that this set of events is what Lueck alleges occurred, because he did eventually receive all his disability benefits. The state claim can be adjudicated without needing to reach the "merits" of any underlying labor dispute. The state court need not consider, much less resolve, whether A-C violated its insurance contract—and, hence, its labor agreement—by disputing Lueck's disability claim. Finally, the state claim remedies would be for the insured's injuries

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Board's lack of concern with 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption."

The defendants argue that Lueck, as a union member, bargained away his right to seek a remedy for his bad faith claim. The defendants assert that the collective bargaining process contemplates giving up some rights in exchange for security and uniformity in treatment by employers pursuant to a labor agreement. While this is a valid point, we do not agree that collective bargaining necessarily means that employees surrender all their rights to legal redress for injury, except as provided by the labor agreement. To permit segments of this state's citizens to sign away their right to pursue a bad faith claim merely by being subject to a labor agreement would be an intolerable result. This is especially true where, as here, the legal right being pursued is not central to the collective bargaining agreement or the regulation of labor relations. We agree, however, that where specific disputes directly involve a labor agreement, the terms of the labor agreement and federal labor law will govern resolution of the issue.

as recognized in *Anderson*,[10] the state remedy would not involve enforcement of the terms of the labor agreement. Simply put, "[a]lthough the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same," *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. at 196-97, because they involve separate and independent claims and remedies.

We recognize that there is some risk that the state bad faith action could touch on federal enforcement of the labor agreement. A finding of bad faith could constitute the basis for an unfair labor practice claim. However, the Supreme Court in *Farmer* noted that the state action should not "threaten *undue* interference with the federal regulatory scheme." *Farmer*, 430 U.S. at 302 (emphasis added). We do not believe permitting a bad faith action to proceed will *unduly* interfere with the federal regulatory scheme. In the language of the Supreme Court, when "[v]iewed ... in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304.

The Supreme Court cases in this area demonstrate that " the decision to pre-empt ... state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies' of permitting the state court [action] to proceed." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. at 189, citing *Vaca v. Sipes*, 386 U.S. 171, 180

[10] The Supreme Court in *Farmer* noted that damages assessed for the state law tort claims should remain separate from any related federal law claim. *Farmer v. Carpenters*, 430 U.S. at 305 n. 13. Likewise, we caution that in this sort of case the jury should be instructed that it is to consider only the bad faith claim, not any alleged breach of contract claim, when determining the plaintiff's damages.

(1967).[11] We conclude that permitting Lueck to proceed with a state bad faith action will advance substantial state interests without interfering with the enforcement of national labor policies in the area of insurance contract arising from labor agreements. We hold that a state bad faith claim arising from an insurance contract may be brought even though the insurance contract is part of a labor agreement otherwise governed by federal labor law. The trial court erred in concluding that Lueck's bad faith claim was governed by federal labor law. Accordingly, we reverse the court of appeals and remand the case for trial.

The final issue is whether the court of appeals erred in finding that Aetna had no liability for bad faith because, as an administrator of the insurance contract, it had no fiduciary duty to act in good faith. By virtue of the contract between A-C and Aetna, Aetna became A-C's agent for purposes of administering A-C's insurance contract with Lueck. As an agent specifically hired to administer the insurance contract, Aetna is not "a stranger to the [insurance] contract and to the fiduciary relationship it signifies." *See Kranzush v. Badger State Mutual*

[11] The same general principle was recently stated by the Supreme Court in *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043 (U.S. Jan. 10, 1984) (No. 81-2159). In *Silkwood* the Court held that the plaintiff's award of punitive damages in a state court was not preempted by federal nuclear regulatory law. The Court noted that Congress, in passing legislation regulating the nuclear power industry, did not forbid the states from providing state law remedies for injuries suffered while working at federally regulated nuclear plants. As the Court stated, "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id.* at 4048. Although *Silkwood* is factually distinguishable from this case, we believe that the principle of protecting legitimate state interests from federal preemption, unless specifically supplanted or in direct conflict with federal law or policy, is equally applicable to this case.

Casualty Co., 103 Wis. 2d 56, 73, 307 N.W. 2d 256 (1981). As such, Aetna stands in the same relationship with Lueck as does A-C and, therefore, has the same fiduciary duty as the primary insurer.[12] We hold that, even though the ultimate authority to approve or disapprove the payment of a claim rests with the primary insurer, the administrator still may be held liable if, in the administration of the claim, the administrator independently engages in conduct actionable under the tort of bad faith.

Because we have concluded that a fiduciary relationship exists between Lueck and Aetna, the issue of Aetna's liability must be determined by its conduct in managing Lueck's claim. In this case Aetna moved for summary judgment, in part on the grounds that the record showed it did not play any active role in the management of Lueck's disability claim. The circuit court granted summary judgment in Aetna's favor, but did so on other grounds. The court of appeals, however, independently reached this issue, deciding that Aetna had no liability for bad faith. In light of the fact that the circuit court had made no findings or decision on this issue and the fact that the plaintiff had filed an affidavit claiming that he needed to engage in further discovery in order to oppose Aetna's motion, we conclude that the court of appeals erred in deciding this issue. We reverse the court of appeals and remand this issue to the circuit court for further consideration of Aetna's summary judgment motion and the plaintiff's request to be permitted further discovery.

By the Court—The decision of the court of appeals is reversed, and cause remanded for further proceedings consistent with this opinion.

[12] We emphasize that, even if Aetna is to be held liable along with A-C, Lueck has only one claim for bad faith against the defendants. He may not pursue separate actions against each defendant because each is jointly and severally liable for Lueck's damages arising from a single transaction or occurrence, namely, the handling of his disability claim.

Filed: January 31 1984
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin

No. 82-1041

STATE OF WISCONSIN

IN SUPREME COURT

Roderick S. Lueck,
Plaintiff-Appellant-Petitioner,

vs.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

STEINMETZ, *J.* (*Dissenting.*) I dissent from the result of the majority opinion and from its reasoning.

The bad faith claim in this case depends entirely on interpretation of the labor contract between the plaintiff, the union and Allis-Chalmers. In *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W. 2d 256 (1981), we held: "The insurer's duty of good faith and fair dealing arises from the insurance contract and runs to the insured. No such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies." The majority now abandons the holding in *Kranzush*. Because any duty allegedly violated by Allis-Chalmers in the present case was specifically created by the labor contract, *and would not exist absent* such contract, it must fall within the ambit of sec. 301 of the Labor Management Relations Act (LMRA), which governs labor agreements. Without the existence of the labor contract conferring disability benefits upon union members, there can be no action in this case based on a failure to pay such benefits. A finding of bad faith will necessarily be premised on a finding that a labor agreement, governed by federal law, has been violated. To do as the majority holds fragments federal labor law.

Section 301 of the LMRA provides the jurisdictional basis for any claim arising out of a contract between an employer and a labor organization. In addition to the right to maintain a sec. 301 action, an employee or union having a claim arising from a collective bargaining agreement, or believing that the employer has failed to honor the agreement in good faith, may file an unfair labor practice charge with the NLRB alleging a violation of the National Labor Relations Act (NLRA), 29 U.S.C. sec. 158(a)(5) and 158(d). Also, this plaintiff who asserts a claim arising from a labor contract has the choice of exhausting his contractual remedies and instituting a lawsuit or filing a charge with the appropriate administrative agency. In either event, he has a federal claim arising under federal labor law.

If the plaintiff seeks a claim under sec. 301, he must exhaust his contractual remedies before instituting court action. Plaintiff did not so exhaust his remedies.

If plaintiff's claim is not a federal claim under sec. 301, but rather is a state law claim, then there are overriding considerations of federal labor policy that would require its dismissal.

The bad faith violation this plaintiff is asserting depends entirely on the labor contract since his rights and remedies do not exist but for the contract. Because the activities of which plaintiff complains are of the type prohibited by the NLRA, any state cause of action based on such activity is preempted by federal labor law, since it is of major concern to such law and policy. The mere existence of a state tort of bad faith does not mean that the tort is deeply rooted in local feeling and responsibility or that the state's interest is necessarily greater than the interest in federal uniformity. There can be no finding of bad faith here without an antecedent finding that the underlying contract has been violated. It is this agreement which created the duty of good faith that plaintiff claims was violated, and it is this agreement that must be interpreted as the threshold issue.

For these reasons, I would affirm the decision of the court of appeals dismissing the complaint as to Allis-Chalmers Corporation. For the same reasons, I would affirm the court of appeals as to dismissal of the complaint as to Aetna Life and Casualty Company.

The majority has found as a matter of law that Aetna has a fiduciary relationship with Allis-Chalmers so that "Aetna stands in the same relationship with Lueck as does A-C and, therefore, has the same fiduciary duty as the primary insurer." (Slip op. at 16.) That holding by the majority on this inadequate factual record as to the relationship between Aetna and A-C is not possible. Even the plaintiff asked only for more discovery to determine fully the relationship between Aetna and A-C. In regard to Aetna, at the very least, the court should have remanded the case for further discovery.

I dissent.

APPENDIX B

Court of Appeals Decision
Dated and Released
March 18, 1983

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE: This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports

No. 82-1041

STATE OF WISCONSIN

IN COURT OF APPEALS

District I

Roderick S. Lueck,
Plaintiff-Appellant,

v.

Aetna Life & Casualty Company and
Allis-Chalmers Corporation,
Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county: LEAH M. LAMPONE, Judge. *Affirmed.*

Before Decker, C. J., Moser, P. J. and Wedemeyer, J.

WEDEMEYER, J. Roderick S. Lueck appeals from a summary judgment granted to the defendants, Aetna Life & Casualty Company (Aetna) and Allis-Chalmers Corporation (Allis-Chalmers). We affirm.

Lueck alleged in his complaint that the defendants in bad faith denied him benefits for disability resulting from a nonoccupational injury. The trial court granted Aetna and Allis-Chalmers summary judgment because Lueck's claim of

bad faith was governed by sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185, or alternatively, was preempted by federal labor law.

We determine that the judgment must be affirmed because the tort of bad faith is not applicable to Aetna under facts of this case and because the doctrine of federal preemption bars Lueck's bad faith claim against Allis-Chalmers.[1]

BAD FAITH

In *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978), our supreme court determined that an insured may assert a claim in tort against an insurer for the bad faith refusal to honor a claim of the insured. *Id.* at 680, 271 N.W.2d at 371. The next bad faith case was *Coleman v. American Universal Insurance Co.*, 86 Wis.2d 615, 273 N.W.2d 220 (1979), in which the supreme court held that where a worker's compensation insurer acts in bad faith in the settlement or payment of compensation benefits, a separate tort may be alleged and proved. *Id.* at 620, 273 N.W.2d at 221. The supreme court concluded in *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wis.2d 56, 307 N.W.2d 256 (1981), that a tort victim could not bring an action against the tortfeasor's insurer for bad faith in failing to settle the victim's claim. *Id.* at 57, 307 N.W.2d at 257. Lastly, this court decided in *Cornejo v. Polycon Industries*, 109 Wis.2d 649, 327 N.W.2d 183 (Ct.App. 1982), that a bad faith claim brought against an employer for

[1] Allis-Chalmers also argues that Lueck's claim must fail because it falls within the scope of sec. 301 of the Labor Management Relations Act. Section 301 provides that claims arising out of a collective bargaining agreement must apply federal labor law. Allis-Chalmers further argues that Lueck failed to exhaust his contractual remedies and therefore, that his bad faith claim should be barred. We need not decide these issues because we have decided that Lueck's bad faith claim is preempted by federal labor law.

refusing to rehire an employee injured in the course of his employment was not actionable. *Id.* at 651, 327 N.W.2d at 184. This court also stated in *Cornejo* that *Coleman* extended the scope of the tort of bad faith in worker's compensation cases only to the employer's insurer, not to the employer itself. *Id.* at 652, 327 N.W.2d at 184.

Here, Lueck alleges that his disability benefits were cut off several times without reason. Lueck's complaint specifically avers that Aetna and Allis-Chalmers committed the tort of bad faith.

It is undisputed that Aetna was hired by Allis-Chalmers to administer the insurance contract between Allis-Chalmers and the United Auto Workers (UAW). The UAW represented Lueck, among others, in negotiating this contract with Allis-Chalmers. The funds used to pay disability benefits were those of Allis-Chalmers. Only Allis-Chalmers had the ability to authorize or terminate benefits.

We determine that, under the circumstances of this case, a bad faith claim cannot be maintained against Aetna. Since Aetna was only hired to administer the insurance benefits of the contract between Allis-Chalmers and the UAW, the fiduciary relationship between insured and insurer, which triggers a good faith duty to settle claims, does not exist between Aetna and Lueck. *See Kranzush, supra*, 103 Wis.2d at 60-62, 307 N.W.2d at 259-60. Thus, a bad faith claim against Aetna may not be maintained.

FEDERAL PREEMPTION

Assuming that Allis-Chalmers has a fiduciary relationship with Lueck necessary to establish a bad faith claim, we determine that this state law claim is preempted by federal labor law. We therefore affirm the judgment of the trial court.

Both parties agree that the principle of preemption of state law claims by federal labor law was enunciated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

The Court in *Garmon* noted that, due to our federal system of government, states had power to regulate activity which was a mere peripheral concern of the Labor Management Relations Act, *id.* at 243, and states had jurisdiction of conduct which touched interests deeply rooted in local feeling and responsibility which Congress had not specifically decided to legislate. *See id.* at 244. State jurisdiction did not yield if the conduct complained of fit into either of these categories.

In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977), the Supreme Court determined that a complaint alleging a state tort of intentional infliction of emotional distress was not preempted by federal labor law. *See id.* at 302. We do not think *Farmer* is apposite to the present case.

Here, Allis-Chalmers's conduct toward Lueck arguably constitutes a § 8 unfair labor practice. We determine this because Allis-Chalmers's action may have been a refusal to perform under its contract with the UAW. *See* 29 U.S.C. § 158(5). We also determine that Allis-Chalmers's conduct is of more than a peripheral concern of the Labor Management Relations Act. Refusing to abide by a collective bargaining agreement is an utmost concern of the Act.

Lastly, this court determines that the bad faith claim of Lueck does not touch interests so deeply rooted in local feeling

and responsibility to allow it not to be preempted by federal labor law.

We make this last determination for the following reasons: This court believes that Congress intended to regulate conduct which, in essence, was a refusal to abide by a contract between union and management. The bad faith claim, while acknowledged since *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1931), is not of such a substantial interest to allow concurrent jurisdiction. We do not believe that *Farmer, supra*, mandates a conclusion that Lueck's claim is not preempted. Although both intentional infliction of emotional distress and bad faith are intentional torts, the claims are not so similar as to require that *Farmer, supra*, be precedent for this case. We further determine that, if this claim is preempted, it will affect the administration of federal labor policy. Again, we must draw attention to the point that Allis-Chalmers has arguably failed to abide by its contract with the UAW. Whether Allis-Chalmers failed to so do is a question that a court must answer if it were to hear Lueck's bad faith claim. We affirm.

By the Court.—Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

APPENDIX C

Filed May 17, 1982
Francis X McCormack, Clerk

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Roderick S. Lueck,

Plaintiff,

vs.

Aetna Life & Casualty Company and Allis Chalmers Corporation,

Defendants.

ORDER FOR JUDGMENT
Case No. 573158

The above-entitled proceedings having come on for consideration before the Honorable Leah M. Lampone, Circuit Judge, presiding, on March 29, 1982; and appearances having been made by Gerald S. Boisits on behalf of Plaintiff, Robert C. Burrell on behalf of Defendant Aetna Life & Casualty Company, and Renee L. Johnson on behalf of Defendant Allis-Chalmers Corporation; and the Court, after receiving written and oral argument from the parties, having determined:

1. That Plaintiff's cause of action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185;

2. That Plaintiff is precluded from maintaining the present cause of action because he has failed to exhaust certain contractual remedies available to him under the grievance-arbitration procedure of the collective bargaining agreement and the letters of understanding negotiated by Defendant Allis-Chalmers Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248; and

3. That even if Plaintiff's cause of action were deemed to arise under state law instead of Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185, it would nevertheless be preempted by federal labor law;

NOW, THEREFORE,

IT IS HEREBY ORDERED that Defendants' motions for summary judgment be, and the same hereby are, granted, and that judgment be entered dismissing this action on its merits with prejudice, and with costs awarded to Defendants.

Dated this 17 day of May, 1982.

BY THE COURT:

/s/ LEAH M. LAPONE
Honorable Leah M. Lampone

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 83-1748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,

Petitioner,

v.

RODERICK S. LUECK,

Respondent.

On Writ Of Certiorari To The Supreme Court of Wisconsin

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 27, 1984

CERTIORARI GRANTED OCTOBER 1, 1984

50 pp

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

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January 18	Complaint filed in Circuit Court, Milwaukee County, Wisconsin.
February 10	Allis-Chalmers Answer filed.
February 12	Aetna Life & Casualty Answer filed.
February 23	Allis-Chalmers motion for summary judgment and brief in support filed.
February 26	Aetna Life & Casualty motion for summary judgment and brief in support filed.
March 29	Circuit Court grants summary judgment for Aetna and Allis-Chalmers.
April 20	Motion for order modifying proposed order for judgment filed.
May 17	Circuit Court grants motion for order modifying proposed order for judgment.
	Order for judgment—case dismissed on merits with prejudice and with costs awarded to defendants.
June 2	Notice of appeal filed with Wisconsin Court of Appeals (District 1).
September 2	Record filed with Court of Appeals.
1983	
March 18	Judgment affirmed by Court of Appeals.
May 24	Review granted by Wisconsin Supreme Court.
1984	
January 5	Case argued before Wisconsin Supreme Court.
January 18	Supplemental record filed.
January 31	Wisconsin Supreme Court decision reversing Court of Appeals and remanding for further proceedings consistent with opinion.

STATE OF WISCONSIN

CIRCUIT COURT, MILWAUKEE COUNTY

RODERICK S. LUECK, *Plaintiff,* vs. AETNA LIFE & CASUALTY COMPANY and ALLIS CHALMERS CORPORATION, *Defendants.*	Case No. 573158

COMPLAINT

(Filed January 18, 1982)

NOW COMES the above-named Plaintiff by his attorneys, FRANK AND KENNY, and as and for a cause of action against the above-named Defendants alleges and shows to the Court as follows:

1. Plaintiff is an adult residing at 759 Road Q, in the City of Okauchee, County of Waukesha, State of Wisconsin.

2. Defendant, AETNA LIFE & CASUALTY COMPANY, is a foreign corporation doing business in the State of Wisconsin having its principal offices at 115C Elm Street, Enfield, Connecitcut(sic) and local offices at 2675 North Mayfair Road, Milwaukee, Wisconsin, and is in the insurance business.

3. Defendant, ALLIS CHALMERS CORPORATION, is a Delaware corporation doing business in the State of Wisconsin having its principal offices at 1205 South 70th Street, City of West Allis, County of Milwaukee, and State of Wisconsin, and is engaged in the manufacturing business.

4. That on July 17, 1981, Plaintiff was an employee of the Defendant, ALLIS CHALMERS CORPORATION, and had been so employed since February 24, 1975. That as a part of the consideration for said employment, Plaintiff was insured by AETNA LIFE & CASUALTY COMPANY under contract No. ACS-55878-1, which contract, among other things, insured the Plaintiff against disability for non-occupational injury. That said contract was in effect on the above-mentioned date.

5. That on Sunday, July 19, 1981, Plaintiff injured his back while carrying a pig to a pig roaster at a friend's house. That said injury was a condition not related to Plaintiff's employment but was covered under Defendant AETNA'S previously mentioned disability insurance policy.

6. That as a result of said injury, Plaintiff has been unable to work to date. That on July 24, 1981, Plaintiff reported to Waukesha Memorial Hospital's emergency room for treatment of said injury and was subsequently and is currently being treated by Doctor John T. Bolger, M.D., who has consistently maintained that Plaintiff is unable to work.

7. That Defendant, ALLIS CHALMERS CORPORATION, was notified of Plaintiff's injury by Plaintiff on July 20, 1981, and a claim was made by the Plaintiff to the Defendant, AETNA, on or before July 27, 1981, for disability benefits.

8. That by virtue of the provisions of said insurance contract the Defendants, AETNA and ALLIS CHALMERS, established a relationship with the Plaintiff which created duties on the part of the Defendants to act in good faith and deal fairly with the disability claims of the Plaintiff.

9. That Defendants have intentionally, contemptuously, and repeatedly failed to honor the above-mentioned duties to the Plaintiff by discontinuing Plaintiff's disability benefits though Plaintiff has been independently evaluated by three (3) separate physicians at the request of the Defendant on three (3) separate occasions; and even though these physicians have confirmed Plaintiff's disability.

10. That the Defendants and each of them lacked a reasonable basis for denying Plaintiff's disability benefits and knew or recklessly disregarded the lack of a reasonable basis for continually denying Plaintiff's disability benefits.

11. That as a result of Defendants' bad faith in dealing with the Plaintiff, Plaintiff was denied the benefits of the contract for which he bargained and incurred debts in order to sustain himself, was unable to honor previous debts incurred by him prior to his injury thus impairing his credit record, and causing Plaintiff great emotional distress, physical impairment, pain, and suffering.

WHEREFORE, Plaintiff demands Judgment against the Defendants and each of them in the amount of Ten Thousand and no/100 ($10,000.00) Dollars in compensatory damages and Three Hundred Thousand and no/100 ($300,000.00) Dollars in punitive damages together with costs, disbursements, and attorney's fees.

Dated this 18th day of January, 1982.

FRANK AND KENNY

By: /s/ GERALD S. BOISITS
Gerald S. Boisits
Attorney for Plaintiff

P.O. Address:
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Suite 1906
Milwaukee, Wisconsin 53203-1953
(414) 277-0377

EXCERPTS OF ALLIS-CHALMERS ANSWER
(Answer in its entirety was filed February 10, 1982)

The excerpts of this answer can be found at pages 28-30 of the Appendix to the Petition for a Writ of Certiorari.

STATE OF WISCONSIN
CIRCUIT COURT, MILWAUKEE COUNTY

(Title omitted in printing)

• • • • •

MOTION FOR SUMMARY JUDGMENT

(Filed February 23, 1982)

NOW COMES Defendant Allis-Chalmers Corporation, by its attorneys, Stanley S. Jaspan and Renee L. Johnson, and, pursuant to Section 802.08(2), Wis. Stats., moves this Court for summary judgment in its favor on the grounds that:

1. Neither the complaint nor any cause of action contained therein state a claim upon which relief can be granted.

2. Plaintiff has failed to exhaust the remedies available to him under the grievance procedure of the collective bargaining agreement and the letters of understanding in effect between Allis-Chalmers Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248, which exhaustion must be proved in order to sustain a cause of action against Defendant Allis-Chalmers Corporation.

This motion is based on the pleadings, the Affidavit of Bruce N. Petterson with Exhibit Nos. 1, 2 and 3 incorporated therein by reference, and the brief of Defendant Allis-Chalmers Corporation in support of its motion herein.

Dated this 23d day of February, 1982.

STANLEY S. JASPAN
RENEE L. JOHNSON

By /s/ RLJ
Attorneys for Defendant
Allis-Chalmers Corporation

Of Counsel:
Foley & Lardner
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
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AFFIDAVIT OF BRUCE N. PETTERSON ATTACHED TO ALLIS-CHALMERS MOTION FOR SUMMARY JUDGMENT
(Filed February 23, 1962)

This affidavit can be found at pages 31-34 of the Appendix to the Petition for a Writ of Certiorari.

STATE OF WISCONSIN
CIRCUIT COURT, MILWAUKEE COUNTY

EXCERPTS OF EXHIBIT 1
(Exhibit 1 in its entirety was filed February 23, 1962)

1960-1962

AGREEMENT

ALLIS-CHALMERS CORPORATION

WEST ALLIS PLANT

agreement with

INTERNATIONAL UNION
UNITED AUTOMOBILE, AEROSPACE
& AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

and its

LOCAL 248

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1 The WEST ALLIS PLANT of the ALLIS-CHALMERS CORPORATION (hereinafter referred to as the "Company") and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (hereinafter referred to as the "International") and LOCAL 248 (hereinafter referred to as the "Union"), agree as follows:

Article I

DESCRIPTION OF UNIT AND DEFINITION OF EMPLOYE

2 Pursuant to and in conformity with the National Labor Relations Act, the Company recognizes the Union as the sole and exclusive bargaining agency for the following employes at its West Allis Plant:

3 The production and maintenance employes (at the West Allis Plant of the Company) exclusive of draftsmen, technical engineers, pattern makers, maintenance electricians, powerhouse employes, Superintendents, Assistant Superintendents, General Foremen, Foremen, Assistant Foremen, Graduate Trainees, Indentured Apprentices in trades in which the journeymen are not represented by the Union, Cooperative Student Trainees, Time Study Foremen, Apprentice Supervisors, Timekeepers, Plant Protection Employes, Confidential Employes, and all other employes acting directly or indirectly in the interest of the Company in a supervisory, management, administrative or professional capacity.

4 Pursuant to National Labor Relations Board Certification in Case Number 30-RC-3562, the Company recognizes the Union as sole and exclusive bargaining agent for the following employees:

5 All inspectors and nondestructive test technicians employed at the Employer's West Allis, Wisconsin facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

6 The terms "employe" and "employes" as used in this agreement (except where the context clearly indicates otherwise) shall mean an employe or employes within the bargaining unit represented by the Union.

• • • • •

Section O. Health and Life Insurance

138 The Health and Disability Benefits, Group Life and Accidental Death and Dismemberment Insurance, and Supplemental Survivor Benefits plans are set forth as Exhibits F and G.

• • • • •

Article VIII

GRIEVANCE PROCEDURE

201 **Section A.** On behalf of the Union there will be the following setup:

202 1. There may be a Steward for each shift for each numbered department. Present practices will be continued during the term of this agreement to include recognition by the Company of more than one Steward in departments with large numbers of employes, and designation of one Steward to represent several departments with small numbers of employes. Any such arrangements will continue, as before, to be by mutual agreement. Such Steward shall be a regular employe working in the department or a department, as the case may be, and on the shift he represents.

203 No Steward shall be a Chief Steward or a member of the Bargaining Committee.

204 2. There may be a Chief Steward for each of the Superintendent divisions established from time to time by mutual agreement. Such Chief Steward shall be a regular employe working in the division and on the shift he represents.

205 3. There may be a Bargaining Committee which shall consist of the President and not more than nine (9) members designated by the Union who shall be regular employes of the Company.

206 In the event a member of the Bargaining Committee designated above is absent for a period of three weeks or more, the Company, at the Union's option, will recognize the Vice-President as a temporary member of the Committee under Paragraph 205 to fill the vacancy.

207 At least one of the members of the Bargaining Committee shall be working in an occupational classification for which the Company has an indentured apprentice course.

208 The Vice-President of the Local Union may participate in meetings and conferences between the parties as specified in following provisions.

209 **Section B.** On behalf of the Company there will be the following setup:

210 1. The Foreman (or Assistant Foreman) of the aggrieved employe;

211 2. The Superintendent (or his designated representative) of the aggrieved employe; and

212 3. The Company's Management Committee consisting of members appointed by the Company.

213 **Section C.** The Company and Union shall furnish to each other lists of their representatives as provided in the grievance procedure, and shall promptly, but in any event within one week, advise of the changes therein. The Company shall not recognize any employe as such a Union representative without such notice.

214 **Section D.** The various steps in the procedure are:

215 **FIRST**: An employe should promptly submit directly to his Foreman (or Assistant Foreman) any grievance concerning his employment, but he may request his Foreman (or Assistant Foreman) to send for the Steward of the department for the purpose of joint oral presentation of the grievance by the employe and the Steward to the Foreman (or Assistant Foreman).

216 An inactive employe wishing to file a grievance will, upon request made at the Employment Office, be afforded the services of a Steward from the department in which he last worked.

217 When the complaining employe requests a Steward, the Foreman (or Assistant Foreman) shall promptly and, in any event, within one-half (½) hour after the request send for such Steward. If the Steward is absent, the Foreman (or Assistant Foreman) shall send for the Steward from an adjacent department. The complaining employe shall have the right to refrain from discussing his grievance with the Company representative until the arrival of the Steward. Either before or during the joint oral presentation of the grievance to the Foreman (or Assistant Foreman), the employe and his Steward shall, at their request and after explaining the grievance to the Foreman (or Assistant Foreman), be permitted to discuss such

grievance privately at the employe's place of work. But, if the Foreman (or Assitant(sic) Foreman) believes that the discussion is continuing beyond a reasonable length of time, he may inquire of the Steward and employe when they expect to conclude their discussion and may fix a time for its termination.

218 The joint oral presentation shall take place at the complaining employe's place of work.

219 No activity in connection with this step shall be carried on during the first half hour of any shift, except in a case in which the Company charges an employe with a breach of discpline(sic) during such period.

220 A Foreman (or Assistant Foreman) shall advise the Steward of his disposition of any grievance presented by an employe without the presence of the Steward if the grievance involves the application of a provision of this agreement; provided, however, that at the option of the Union, after one week's written notice thereof to the Company, the duty of the Foreman in this connection shall be controlled by the prevailing authoritative interpretation of Section 9(a) of the National Labor Relations Act.

221 In order to further the parties' mutual goal that grievances shall be processed in an efficient manner, the Union shall encourage Stewards to combine in a single written group grievance related grievances arising in the same department and on the same shift which concern the same condition, personnel transaction or occurrence, which have not been satisfactorily adjusted by the Foreman and such group grievance shall thereafter be processed through the procedure as if it were one grievance. All employes listed on the grievance shall be covered by the disposition of the grievance.

An employe whose rights are affected by the group grievance who is inadvertently not listed thereon shall be covered by the disposition of the grievance subject to liability provisions as of the date the employe is identified.

222 **SECOND**: If the grievance is not satisfactorily adjusted within twenty-four (24) hours, then the grievance may be reduced to writing by the Steward on a form to be provided by the Company. The complaining employe shall sign the grievance. Thereafter the Steward shall hand the grievance to his Foreman (or Assistant Foreman), who shall sign and promptly forward it to the Superintendent in charge of the division. The Superintendent shall promptly provide the Chief Steward with three (3) copies of the grievance. The Area Bargaining Committeeman will be promptly provided with a copy of the written grievance. The Superintendent shall thereafter, at the Union's request, set a mutually convenient time for discussion of the grievance, either during working hours or at the end of the shift. The Steward, the Chief Steward, and a member of the Bargaining Committee or the President of the Union shall have the right to be present at that discussion. At the request of the Union or at the instance of the Company, the complaining employe may also be present.

223 At the request of the Chief Steward, the Union representatives (and the complaining employe, if present) may, immediately prior to the discussion, confer privately in a suitable place designated by the Superintendent. If the Superintendent believes that the conference is continuing beyond a reasonable length of time, he may inquire of the conferees when they expect to conclude their discussion and may fix a time for its termination.

224 **THIRD**: If the written grievance is not satisfactorily adjusted within forty-eight (48) hours after being handed to the Foreman for forwarding to the Superintendent, it may be presented by the Bargaining Committee to the Management Committee for discussion. Such discussion shall be held within seven (7) days—either during working hours or at the end of the first shift, at a mutually convenient time fixed by the Management Committee. The Chief Steward may also be present at such discussion, and at the request of the Union or the instance of the Company, the complaining employe and any other employes in the bargaining unit in possession of facts relevant to the grievance may also attend. At such discussion, the Company and the Union may have additional representatives who are not employes of the Company.

225 A member of the Bargaining Committee shall have the privilege of discussing, during his working hours, the subject matter of a grievance which has not been satisfactorily adjusted in the first two steps of the grievance procedure with the following persons in his geographic area as determined by the Union and the Management Committee:

226 1. The complaining employe;

227 2. The employe's Foreman;

228 3. The employe's Superintendent;

229 4. The employe's fellow employes in possession of facts essential to the preparation of the Union's appeal of the grievance.

230 This privilege is granted upon the understanding (a) that it will be used exclusively for the purpose of preparation by the Bargaining Committee of its case upon such grievance for presentation upon appeal to

the Management Committee in the THIRD STEP of the grievance procedure, and (b) that the Bargaining Committeemen will report to the Superintendent in charge before discussing such matter with the persons indicated above.

231 The Company may limit or suspend this privilege, upon an individual basis, if (a) it is not exercised as authorized or (b) more time is spent in the above-authorized discussions than is necessary for the proper preparation of the case; provided, however, that no limitation or suspension of the privilege shall become effective without notice to the Union of the condition which is the basis for the contemplated action and reasonable opportunity for the Union to remedy such condition.

232 A grievance which has been the subject of discussion in the THIRD STEP should be answered within ten (10) work days after such discussion. Any grievance within the jurisdiction of the Impartial Referee for determination as provided in paragraph 240 and which is not satisfactorily adjusted within ten (10) work days after discussion in the THIRD STEP, may be certified by the Union for an Impartial Referee hearing.

233 The Company will honor a single reappeal of the Management Committee's third step ruling with the understanding that the Union, when it reappeals, will have additional information to provide in regard to the particular grievance to justify the reappeal of the Management Committee's original ruling.

234 A second reappeal will be considered in the event the Bargaining Committee representative explains in advance to the Management Committee representative from the area the reason for the requested second reappeal.

235 Upon request to the Management Committee, the International Union representative, selected by the Union to represent it in presenting a grievance before the Impartial Referee, may visit the plant for the purpose of preparing the case for presentation to the Impartial Referee. During any such visit on Company premises, the International Union representative may be accompanied by the member of the Bargaining Committee in the geographic area, the Chairman of the Bargaining Committee, and, at the Company's option, by representatives of the Company. In addition, the International Union representative shall be subject to all Company regulations applying to visitors. The International Union representative and the member of the Bargaining Committee may privately interview employes one at a time, in possession of facts relevant to the grievance. The interviews shall be held at a place designated by the Superintendent in charge and for a reasonable length of time. If the employe requests, he shall be paid his guaranteed hourly rate for time lost from work in such interview.

236 **Section E.** The Company may utilize the following procedure upon any grievance against the Union and the International.

237 **FIRST:** Presentation of the grievance in writing to the Bargaining Committee.

238 **SECOND:** Any grievance within the jurisdiction of the Impartial Referee for determination as provided in paragraph 240 which is not satisfactorily adjusted within fourteen (14) days may be certified by the Company for an Impartial Referee hearing.

239 **Section F.** Every decision of the Impartial Referee made within the scope of his jurisdictional authority

shall be binding upon the Company, the employes, and the Union and the International.

240 The jurisdictional authority of the Impartial Referee is defined as and limited to the determination of any grievance which is a controversy between the parties or between the Company and employes covered by this agreement concerning compliance with any provisions of this agreement and is submitted to him consistent with the provisions of this agreement.

241 **Section G.** The certification for an Impartial Referee hearing shall be subject to the following rules:

242 1. The certifying party shall notify the other party in writing of the grievance which it is certifying for hearing by the Impartial Referee;

243 2. The certifying party shall forward to the Impartial Referee a copy of the grievance and the other party's answer, and also send a copy of such communication to the other party;

244 When any grievance certified for Impartial Referee hearing includes an issue arising out of a conflict in written medical opinions by the Company's and the grievant's physicians, the issue may, by mutual agreement, be submitted to a third physician for his opinion.

245 The procedure for obtaining a third physician's opinion shall be as follows:

246 a. The parties will mutually agree upon a third physician from the medical specialty, if any, pertinent to the medical issue involved.

247 b. By joint letter the third physician will be advised of the medical issue involved and will be provided with copies of the conflicting written medical opinions.

248 c. The third physician shall examine the subject of the conflicting medical opinions, order such medical tests as he may deem necessary, and shall be free to consult with the Company's and grievant's physicians.

249 d. The third physical(sic) shall send a written report of his findings, including reports of any tests ordered, to the Union and the Company.

250 e. The expenses of the third physician and of such medical tests as are ordered by him will be borne equally by the parties. If the grievance concerns an arbitrable matter and is heard by the Impartial Referee, a copy of the third physician's report shall be provided to the Impartial Referee for his information.

251 3. Upon receipt of the grievance and the answer, the Impartial Referee shall fix the time for a formal hearing of the issues of fact and law raised in the grievance and the answer;

252 4. Upon the fixing of a Referee hearing date, the parties may arrange mutually agreeable terms for a pre-hearing conference to consider means of expediting the hearing by, for example, reducing the issue or issues to writing, stipulating facts, outlining intended offers of proof, and authenticating proposed exhibits;

253 5. Two (2) members of the Bargaining Committee shall be paid by the Company at average earned rate for time lost from work in attending the hearing;

254 6. Each essential witness requested by the Union shall be paid by the Company for time lost from work at average earned rate. However, not more than four (4) essential Union witnesses shall be absent from work at the same time.

255 7. At the close of the hearing, the Impartial Referee shall afford the parties reasonable opportunity to submit briefs;

256 8. The Impartial Referee shall render his decision as soon as possible;

257 9. The expenses of the Impartial Referee shall be borne equally by the parties.

258 **Section H.** The tenure of an Impartial Referee shall be terminated by a written notice thereof from a party to the Impartial Referee and the other party.

259 Whenever a vacancy occurs in the office of Impartial Referee, it shall be filled as follows:

260 1. If the parties are unable to select an Impartial Referee within two (2) weeks after certification of a grievance, they shall by joint letter request the Federal Mediation and Concilliation(sic) Service to submit to them a list of names of seven (7) persons suitable for selection as Impartial Referee.

261 2. If the parties cannot agree upon one of the persons named on the list, the Company and the Union shall strike a name alternately beginning with the Company, until one name remains. Such remaining person shall act as Impartial Referee.

262 3. Such appointee shall act as Impartial Referee until his tenure is terminated as above provided.

263 **Section I.** Conferences between the above designated representatives of the Union and representatives of the Company for the purpose of considering matters of mutual interest, other than grievances under consideration in the Grievance Procedure, shall be held:

264 1. Bi-weekly, upon request of either party, between the Stewards, Chief Steward of the division and a

member of the Bargaining Committee and the Superintendent involved.

265 2. At the request of the Union, any Plant Manager will arrange a meeting with not more than two (2) members of the Bargaining Committee working in his division or one committeeman and the President of the Union to discuss any grievance or other matter of mutual interest arising in his division. Within three (3) days after such request, the discussion shall be held at a time mutually convenient and fixed by the Plant Manager either during working hours or at the end of the first shift. Not more than three (3) Chief Stewards may be present at such discussion.

266 3. Upon request of either party, between the Bargaining Committee and the Management Committee.

267 All conferences shall be held at times mutually acceptable to the participants either during working hours or at the end of the shift.

268 Except as may be otherwise expressly provided, only in conferences between the Bargaining Committee of the Union and the Company's Management Committee shall either party have conferees who are not regularly employed by the Company.

269 **Section J.** No representative of the Union may be absent from his work except for the purpose of attending conferences and handling grievances in the manner specifically provided for in this agreement, and then only provided that, before leaving his job, he secures from his Foreman (or Assistant Foreman) the form supplied by the Company for such purpose.

270 **Section K.** After each such absence, the representative of the Union shall report to the Foreman in charge at the time he returns to work.

271 A member of the Bargaining Committee who is working on a night shift, who spends time on the day shift in a third-step grievance procedure meeting with the Company shall be given time off with pay at the rate paid a Bargaining Committeeman who loses time during working hours in handling grievances from his scheduled night shift on the same day equivalent to the time spent in such a meeting.

272 **Section L.** Each representative of the Union officially designated and recognized by this agreement who loses time, during his working hours, in handling grievances and attending conferences in the manner specifically provided in this agreement, shall receive pay therefor at his average earned rate.

273 **Section M.** Employes shall be paid for time lost from work in attending conferences with the Superintendent or the Management Committee at average earned rate. If an employe requests, he shall be paid his guaranteed hourly rate for time lost from work in the joint oral presentation and in the private discussion with the Steward, if any, in the FIRST STEP of the Grievance Procedure.

274 **Section N.** The Company may curtail or withdraw the following privileges in the grievance procedure:

275 1. The privilege provided in paragraph 222 of a Steward to write a grievance during working hours;

276 2. The privilege provided in paragraph 272 of a Steward to be paid for time lost from work for writing a grievance, except that any curtailment of this privilege shall be limited to one-half (½) of such pay;

277 3. The privilege provided in paragarph(sic) 224 of the Union to have employes other than the complaining

employe present in the discussion with the Management Committee.

278 No curtailment or withdrawal, however, shall be made without prior notice to the Union by the Management Committee of the condition prompting the Company to make such curtailment or withdrawal and reasonable opportunity on the part of the Union to remedy such condition.

279 **Section O.** The following grievances which have arisen under the preceding collective bargaining agreement may be processed to completion in accordance with the terms of said agreement:

280 1. Grievances now in process of consideration in the second, third and fourth steps of the Complaint and Grievance Procedure may be processed to completion in accordance with the provisions of said agreement;

281 2. Grievances based on occurrences within five (5) working days prior to the expiration of that agreement and which are presented in writing in accordance with the terms of that agreement on or before five (5) working days after execution of the new agreement.

* * * * *

Section J. Leave for Illness or Injury

414 An employe who is unable to work because of illness or injury will be granted a leave for the period of such disability upon furnishing satisfactory written medical evidence of the fact. If the evidence furnished by the employe is not accepted he shall be so notified in writing by the Company, with a copy of the notice to the Union. The period of such leave shall not exceed the employe's length of service at the time he became

disabled or three (3) years, whichever is greater, provided, however, the leave of absence will expire at the end of two (2) years for employes with less than two (2) years of seniority at the time of disability, unless such leave is extended by the Company or the disability is compensable by the Company under the Worker's Compensation Act.

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EXHIBITS F AND G

These exhibits, entitled "Health and Disability Benefits" and "Group Life and Accidental Death and Dismemberment Insurance, and Supplemental Survivor Benefits" respectively, have been printed in a separate booklet.

• • • • •

STATE OF WISCONSIN

CIRCUIT COURT, MILWAUKEE COUNTY

EXCERPTS OF EXHIBIT 2

(Exhibit 2 in its entirety was filed February 23, 1982)

ALLIS-CHALMERS CORPORATION

and

INTERNATIONAL UNION
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA
and its
LOCALS 125, 248, 1004 and 1319

Health and Disability Benefits and
Group Life Insurance

Agreement Covering Retirement and Pensions

Agreement Covering Supplemental
Unemployment Benefits

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HEALTH AND DISABILITY BENEFITS AND GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE AND SUPPLEMENTAL SURVIVOR BENEFITS

Exhibits B and C of the Memphis Region and the UAW and its Local 1004 March 19, 1980 Agreement.

Exhibits B and C of the Minneapolis Region and the UAW and its Local 125 March 21, 1980 Agreement.

Exhibits F and G of the West Allis Plant and the UAW and Local 248 March 23, 1980 Agreement.

Exhibits A, B and C of the LaPorte Plant and the UAW and its Local 1319 April 11, 1980 Agreement.

HEALTH AND DISABILITY BENEFITS

The Company shall continue to arrange for Health and Disability coverage as hereinafter provided for employees and employees who shall or have retired under the Retirement and Pension Plan.

Such coverage may be provided, at the Company's sole discretion, through a Mutual Aid Society, through a policy or policies issued by an insurance carrier, by arrangement with a non-profit plan or organization, through a self-insured plan, or through a combination of any or all of such methods. The benefits coverage in effect on the date of execution of this agreement, including the terms and conditions of coverage, the rules for initial eligibility, continuance of coverage and other general conditions of coverage and its administration shall remain in effect during the term of this agreement except as may be hereinafter otherwise provided in this section and except as may be otherwise specifically provided in the brief outline of benefits following hereinafter.

All employees shall be eligible for coverage on the sixty first (61st) day following their date of hire, except that any such employee who is not actively at work on the date he becomes eligible or on the date a benefit or change affecting a benefit becomes effective shall have his eligibility deferred until his return to active service. Employees not previously enrolled shall complete an enrollment card.

The following outline of benefits coverage does not attempt to include all the terms and conditions of the coverage or to state the complete coverage. The complete

coverage is set forth in the Aetna Life & Casualty Company contract ACS-55878-1, issued to the Company and in effect on the date of signing this agreement except to the extent revision thereof is necessary to provide the following new benefits coverage.

The non-occupational illness, injury and disability benefits in effect on the date of signing the agreement shall be revised effective the Monday following ratification of the agreement (unless another effective date is specified) to the extent necessary to provide such new benefits and changes in benefits as are specifically and expressly provided in the following outline of benefits, and such new or changed benefits shall be applicable only to a non-occupational illness, injury and disability which commences on or after the effective date of the benefit.

Weekly Disability (Employees Only)

Class	Hourly Earnings	Weekly Benefit
A	Up to $6.60	161
B	$6.60 to $6.90	168
C	6.90 to 7.20	175
D	7.20 to 7.50	182
E	7.50 to 7.80	189
F	7.80 to 8.10	196
G	8.10 to 8.40	203
H	8.40 to 8.70	210
I	8.70 to 9.00	217
J	9.00 to 9.30	224
K	9.30 to 9.60	231
L	9.60 to 9.90	238
M	9.90 to 10.20	245
N	10.20 to 10.50	252
O	10.50 to 10.80	259
P	10.80 to 11.10	266
Q	11.10 to 11.40	273
R	11.40 to 11.70	280
S	11.70 to 12.00	287
T	12.00 and Up	294

An employee's Class shall be determined as follows:

Hourly Employees: The employee's Class shall be determined by his guaranteed hourly rate (including cost-of-living allowance, and night shaft(sic) premium, and excluding overtime premium pay), and will change on the date of a change in his rate which would place him in another Class and provided, that if the employee is not actively at work when the change in classification would otherwise have been made, the change will then take place when he returns to active service.

Incentive Employees: An employee shall be classified on the basis of his average earned rate on the quarterly basis provided for the calculation of this rate at the applicable paragraph in the Labor Agreement. If the employee is not actively at work when the change in classification would otherwise have been made, the change will then take place when he returns to active service.

The hourly earnings class of an employee temporarily assigned to a lower-paying job while receiving Workmen's Compensation shall be determined by reference to his rate prior to his work-connected disability.

A weekly disability benefit shall not exceed 70% of the basic weekly earnings of any employee who is not a regular, full-time employee.

Weekly Disability Benefits shall not be paid for any day for which an employee receives holiday pay.

The foregoing disability benefits shall be payable for a maximum of fifty-two (52) weeks for any one period of disability. If disability is due to an accident, benefits shall be payable beginning with the first day of such disability. If disability is due to disease, benefits shall be payable beginning on the eighth day of disability, upon the first day of earlier confinement as a bed patient in a hospital on which

the employee has worked fewer than four (4) hours, or upon the day following an outpatient surgical procedure for which a benefit of $25 or more is payable.

Employees on layoff, leave of absence, or retirement are not eligible for disability benefits except (1) for disability commencing prior to (a) the end of the month following the month in which the layoff occurs, (b) leave of absence or (c) retirement, (2) disability after recall to work from layoff (but not if he is entitled to diability(sic) benefits under a similar plan of the Company or another employer), and (3) disability during a leave of absence for full time Local Union business if the employee has elected extended coverage and has paid the premium.

Reinstatement of Weekly Disability Benefits During Layoff

Subject to available credit units under the SUB Plan, coverage for Weekly Disability Benefits shall be reinstated for an employee on a qualifying layoff, as defined in the SUB Plan, who in any week, becomes totally and continuously disabled (as defined for receipt of Weekly Disability Benefits) after he has been on layoff status continuously for more than one full calendar month and immediately prior to becoming so disabled was eligible for a Regular Benefit under the SUB Plan or was employed by another employer. Reinstated Weekly Disability Benefits shall be payable beginning with the first day of disability.

The Benefit payable to an eligible employee for any Week shall be an amount equal to the amount of Weekly Disability Benefit applicable to him, less any disability benefit payable under a similar plan of the Company or another employer, and any State System Benefit.

If an employee receives a reinstated Weekly Disability Benefit with respect to any week, credit units shall be can-

celled therefor as provided in Article III 5.(c) of the SUB Plan.

Long-Term Disability (Employees Only)

Effective with respect to employees actively at work on or after (Monday following ratification); Long-Term Disability benefits shall be provided for such employees eligible for Weekly Disability Benefits, but not beyond age 65. At the time an employee exhausts the 52 Weekly Disability Benefits (or prior to receipt of 52 reinstated Weekly Disability Benefits exhausts such reinstated Weekly Disability Benefits due to SUB credit unit exhaustion) and while he is totally disabled (occupational or non-occupational) by bodily injury or illness so as to be prevented thereby from engaging for remuneration or profit in any occupation or employment with the Company covered by the then current collective bargaining agreement providing his seniority, Long-Term Disability Benefits shall be payable for up to the number of full months by which the employee's seniority at the time he was first disabled exceeds twelve (12) months, however not less than twelve (12) months, but in no event beyond the date of death, the time that the employee no longer satisfies the disability requirement, or the end of the month in which he attains age 65.

If an employee's return to work with the Company is not effective to qualify him for a new period of Weekly Disability Benefits, or if he engages in some gainful occupation or employment other than for the Company and other than that for which he is reasonably qualified by education, training, or experience, Long-Term Disability Benefits shall be suspended for a period of such ineffective return to work or period of such other occupation or employment. Upon application upon termination of such work or employment, payment of Long-Term Disability Benefits will be resumed if the employee is then qualified as totally disabled.

The amount of the benefit (subject to reduction and proration) shall be as shown in the following table:

Class	Hourly Earnings	Weekly Benefit
A	Up to $6.60	558
B	$6.60 to $6.90	584
C	6.90 to 7.20	610
D	7.20 to 7.50	636
E	7.50 to 7.80	662
F	7.80 to 8.10	688
G	8.10 to 8.40	714
H	8.40 to 8.70	740
I	8.70 to 9.00	766
J	9.00 to 9.30	792
K	9.30 to 9.60	818
L	9.60 to 9.90	844
M	9.90 to 10.20	870
N	10.20 to 10.50	896
O	10.50 to 10.80	922
P	10.80 to 11.10	948
Q	11.10 to 11.40	974
R	11.40 to 11.70	1,000
S	11.70 to 12.00	1,026
T	12.00 and Up	1,052

Long-Term Disability Benefits shall be reduced by any disability benefits or unreduced old-age benefits under Social Security (primary benefit only) or future legislation providing similar benefits, benefits under any state or federal law providing benefits for working time lost because of disability, any retirement plan benefits, Workmen's Compensation benefits (other than for loss, or 100% loss of use, of a body member, or for disfigurement), and disability benefits under any other Company or other plan (excluding Veterans Disability Compensation) for which the employee is eligible. Effective with respect to benefits for disability on or after July 1, 1971, regardless of when the employee last worked, any such reduction is not in-

creased subsequent to the first day for which Long-Term Disability Benefits are payable or July 1, 1971, if later, except the amount of such increase is not disregarded if it represents an adjustment in the original determination of such benefit.

The monthly equivalent of any benefit payable on a weekly basis is computed at the ratio of 4.33 weekly benefits to 1 monthly benefit.

Reductions of benefits for lump-sum Workmen's Compensation settlements shall be by the monthly equivalent to the amount of the Workmen's Compensation benefit to which the employee would have been entitled had there been no lump-sum payment, but not to exceed in total the amount of the settlement.

Eligibility for Social Security disability benefits and retirement plan disability benefits is presumed in long-term disability calculations. Amounts so deducted are paid upon presentation of satisfactory evidence that these benefits were applied for and denied, except for Social Security Disability benefits that would have been payable but for refusal to accept vocational rehabilitation.

Long-Term Disability Benefits accrued during any calendar month will be payable as of the first day of the next succeeding month. Benefits payable for a period of less than a full calendar month shall be pro-rated on the basis of calendar days of eligibility to 30 days.

Applicants for or recipients of Long-Term Disability Benefits may be required to furnish verification of the amount of income from sources relevant to the benefit calculation. Excess benefits paid may be deducted from future benefits.

Weeks and months in which a benefit is partially or wholly offset are counted as full weeks and months for the

purpose of applying the maximum period of benefits. Fractions of initial and final periods are counted as fractions of the period.

Weekly and Long-Term Disability

An employee may waive eligibility for and receipt of Weekly and Long-Term Disability Benefits. Such waiver shall be effective to make the employee immediately eligible for payment of a Pension or Supplemental Allowance or of group life insurance monthly installments, subject to other full qualification therefor under the Retirement and Pension Plan or Group Life Insurance Plan, as the case may be.

. . . . . .

International Union,
UAW and its
Locals 248 and 1319

March 6, 1980

Gentlemen:

This will confirm the Plants' willingness to meet for the purpose of reviewing and making any agreed-upon changes in the procedures for (1) advance notice to employees, where practicable, of discontinuance of Weekly Disability Benefit payments, (2) protecting the employee against charges that are not "reasonable and customary," by, for example, warning the employee not to agree in advance to a specific fee and describing the insurer's obligation to defend the employee against any legal action, and (3) under coordination of benefits, for the insurer to protect the employee by paying charges promptly and resolve thereafter any issue of inter-carrier responsibility therefor.

Very truly yours,
/s/ James E. Mitts

For the West Allis and
La Porte Plants

Accepted for each Addressee
this 18th day of March, 1980

By /s/ John R. Collins

• • • • •

STATE OF WISCONSIN

CIRCUIT COURT, MILWAUKEE COUNTY

EXHIBIT 3

(Filed February 23, 1982)

Letter No. 2

March 6, 1980

Dear Mr. Greathouse:

The parties, in recognition of their mutual desire to resolve insurance-related issues with a minimum of delay and formality, and at as early a stage as possible, agree to establish within 30 days following ratification of the 1979 Labor Agreement a Joint Plant Insurance Committee.

The Committee will be composed of two members of the Bargaining Committee whom the Union shall designate, and two Company-designed(sic) representatives.

It shall be the purpose of this Committee to discuss for resolution any insurance-related issues that may arise from provisions of the Agreement. Questions within the Committee's scope shall be referred to it, and shall not be processed in the first three steps of the grievance procedure (if such a question is erroneously presented as a grievance, it shall be automatically referred to the Committee), but may be presented for arbitration in the established manner once they have been discussed and have not been resolved. A record shall be kept of the disposition of questions following their discussion by the Committee, and a copy or notice of such disposition shall be provided to the individual concerned.

Meetings of the Committee shall be held once monthly at a time and place which shall be arranged by the Committee. An advance written notice shall be provided to the Company of the Union's proposed agenda for such meeting.

This procedure would not however preclude presentation at Committee meetings, or at any time, of emergency insurance-related questions such as a dispute of terminated disability (income replacement) benefits.

The Committee shall be provided with monthly statements of claim denials and also as early as practicalities permit shall be provided data concerning life insurance payments (death benefits and disability payouts), the names of disabled employes who have reached forty-eight (48) Weekly Disability benefits, and such other information relevant to the Committee's scope which is agreed upon.

Employe insurance claims and questions not resolved orally should be presented promptly, by simple written and signed record of the fact on a form prepared by the Company, of which a copy shall be provided to the Union in advance of monthly meeting dates.

This Joint Plant Insurance Committee procedure shall not preclude discussion from time to time of insurance-related questions by representatives of the International Union with Corporate representatives in the established manner.

Very truly yours, /s/ Nicholas T. Jordan

ORDER FOR JUDGMENT OF THE CIRCUIT COURT, MILWAUKEE COUNTY, WISCONSIN
(Dated May 17, 1982)

This order can be found at pages 26-27 of the Appendix to the Petition for a Writ of Certiorari.

WISCONSIN COURT OF APPEALS
(DISTRICT 1) DECISION
(Dated and Released March 18, 1983)

This decision can be found at pages 21-25 of the Appendix to the Petition for a Writ of Certiorari.

THE WISCONSIN SUPREME COURT DECISION
(Dated January 31, 1984)

This decision can be found at pages 1-20 of the Appendix to the Petition for a Writ of Certiorari.

PETITIONER'S

BRIEF

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No. 83-1748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,

Petitioner,

VS.

RODERICK S. LUECK,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

BRIEF FOR PETITIONER, ALLIS-CHALMERS CORPORATION

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QUESTION PRESENTED

Whether Section 301 of the Labor Management Relations Act and federal labor law developed thereunder preempt a state tort action brought by a union employee against his employer for bad faith delay in making disability benefit payments when (1) the disability plan giving rise to benefits is embodied in a collective bargaining agreement and (2) the employee did not use the contractual grievance procedure to seek redress.

STATEMENT RE PARTIES

Petitioner, Allis-Chalmers Corporation, is the only parent corporation. The following are the only subsidiary or affiliate companies of Allis-Chalmers Corporation:

Lasco, Inc.
A-C Mexicana, S.A.
AFNE-Allis, S.A.
Japan Air Filter Co., Ltd.

Aetna Life & Casualty Company, administrator of the disability plan and a defendant below, is not a party herein.

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Respondent.

On Writ of Certiorari To The Supreme Court of Wisconsin

BRIEF FOR PETITIONER, ALLIS-CHALMERS CORPORATION

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 116 Wis. 2d 559, 342 N.W.2d 699. The opinions of the Wisconsin Court of Appeals and the Circuit Court, Milwaukee County, Wisconsin are unpublished. These opinions are set forth, respectively, in Appendices A, B and C to the Petition for Certiorari filed April 27, 1984.[1]

[1] Hereinafter, the Petition for Certiorari is designated as "Pet. Cert."; the printed Joint Appendix is designated as "J.A.".

JURISDICTION

The decision of the court below issued on January 31, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. § 185) provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A majority of the Wisconsin Supreme Court held that Section 301 of the Labor Management Relations Act does not preempt a state court suit brought by a union employee against his employer alleging tortious bad faith in the administrative handling of his disability claim, even though his right to disability benefits derives entirely from a collective bargaining agreement which provides grievance and arbitration procedures for resolution of disputes relating to benefit payments (Pet. Cert. 5-6).

A. The Facts

Allis-Chalmers and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 248 ("UAW") are parties to a collective bargaining agreement (J.A. 9-30).[2] It incorporates by

[2] The scope of employment matters covered by the parties' basic labor agreement is summarily shown in its Index (J.A. 10-14).

reference a separately negotiated group health and disability plan funded by Allis-Chalmers and administered by Aetna Life & Casualty Company (herein "Aetna"). This plan is not insured and is not required to be insured by the terms of the collective bargaining agreement. Disability benefits are provided for non-occupational illness and injury to all employees represented by the UAW (J.A. 31-42). Respondent, Roderick S. Lueck (herein "Lueck"), was so represented (J.A. 3).

The collective bargaining agreement and a related letter of understanding further provide that any issue or question arising under the disability plan is to be resolved in accordance with a three-step grievance procedure. Unsettled disability grievances may be taken to final and binding arbitration in accordance with provisions established in the labor contract (J.A. 24-27; 43-44).[3]

The present controversy arose in 1981 when Lueck suffered a non-work related injury. He notified Allis-Chalmers of the injury in accordance with the claims processing procedure and thereafter payments were initiated under the plan. Lueck ultimately received all benefits due him. However, benefit payments were interrupted during some portion of his disability period (Pet. Cert. App. 2).

Lueck did not grieve or attempt to grieve under the contractually established grievance procedure. Instead, he sued Allis-Chalmers and Aetna in the Circuit Court of Mil-

[3] The basic labor contract's grievance procedure is a four-step process intended to deal with typical contract issues arising from the plant floor, *i.e.*, discharge and discipline, seniority rights, etc. (J.A. 18-27). By contrast, the grievance procedure for the disability plan is exclusively concerned with disability grievances (J.A. 43-44). However, unresolved grievances under both the basic agreement and the disability plan culminate in binding arbitration under provisions in the former agreement (J.A. 23-27).

waukee County, Wisconsin, alleging that Aetna and Allis-Chalmers intentionally, contemptuously and repeatedly stopped disability payments under the negotiated disability plan which covered him as a UAW represented employee (J.A. 4). Lueck further alleged that as a result of the defendants' bad faith he incurred debts, great emotional distress, physical impairment and pain and suffering. He sought $10,000 in compensatory and $300,000 in punitive damages (J.A. 4).

On February 1, 1982, Allis-Chalmers answered the complaint, denying the material factual allegations and also raising two affirmative defenses: First, that Lueck's state court claim was preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), and, second, that it was barred because Lueck had not exhausted his contractual remedies before bringing suit. Aetna also answered and pleaded similar defenses (Pet. Cert. App. 3, 28-30).

On February 23, 1982, Allis-Chalmers moved for summary judgment on the defenses raised in its answer. An affidavit and exhibits were attached setting forth the provisions of the labor agreement which established Lueck's right to a disability benefit and which also made available to him the agreement's grievance and arbitration procedure (Pet. Cert. App. 31-34; J.A. 8-44).

On May 17, 1982, the Circuit Court granted summary judgment in favor of Allis-Chalmers and Aetna on the Section 301 defenses raised by them (Pet. Cert. App. 26-27). The Wisconsin Court of Appeals affirmed on March 18, 1983 (Pet. Cert. App. 21-25).

B. The Wisconsin Supreme Court Decision

1. *Majority Opinion*

On January 31, 1984, the Wisconsin Supreme Court, with one justice dissenting, reversed the state Court of Appeals. Relying on what it asserted were long standing principles of state insurance law (Pet. Cert. App. 5-6, 11-12), the majority held that any violation of the labor agreement was irrelevant to the issue of bad faith handling of Lueck's disability claim. It also concluded that Lueck's complaint was not preempted by Section 301 of LMRA "even though the insurance contract is part of a labor agreement otherwise governed by federal labor law" (Pet. Cert. App. 16). By necessary implication, the court further held that Lueck's suit could be maintained although he never resorted to the contractually created disability grievance procedure.

The Wisconsin Court also reviewed and applied labor law preemption standards developed in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and other decisions of this Court[4] which focus primarily on the relationship between state regulation and Sections 7 or 8 of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In this context, the court ruled that while the administration of disability claim procedures under a collective bargaining agreement is a matter of only peripheral concern to federal labor law (Pet. Cert. App. 8-11), it is of substan-

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[4] *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *Farmer* v. *United Bhd. of Carpenters & Joiners of America, Local 25*, 430 U.S. 290 (1977); *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656 (1954); and *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, 356 U.S. 634 (1958) (Pet. Cert. App. 7, 8, 10-13).

tial significance to the State of Wisconsin which has a deeply rooted responsibility in assuring the prompt payment of disability claims (Pet. Cert. App. 5-6, 11-13).

2. *Dissenting Opinion*

The dissenting justice rejected this analysis. He reasoned that since "any duty allegedly violated by Allis-Chalmers in the present case was specifically created by the labor contract, *and would not exist absent such contract*, it must fall within the ambit of Sec. 301 of the Labor Management Relations Act (LMRA) which governs labor agreements" (Pet. Cert. App. 18, emphasis in original). Unlike the majority, which failed to address the issue expressly, the dissent further asserted that Lueck's cause of action was precluded by his failure to exhaust contractual remedies (Pet. Cert. App. 19). Finally, the dissent concluded that the mere existence of a state tort of bad faith is insufficient to override uniformity in the application of federal labor law and that "to do as the majority holds fragments federal labor law" (Pet. Cert. App. 18, 19).

SUMMARY OF ARGUMENT

A majority of the Wisconsin Supreme Court disregarded fundamental tenets of Section 301 law in holding that Lueck, a union member represented for purposes of collective bargaining by the UAW, could maintain a tort action against Allis-Chalmers for bad faith disability claims processing when both his rights to disability benefits and his remedies for infringement of such rights are governed by a labor contract with a grievance procedure culminating in final and binding arbitration.

Congress in Section 301 and this Court in interpreting Section 301 have made the collective bargaining agreement

the paramount source of labor relations law and procedure for employers, unions and represented employees. But the majority below incorrectly held that violation of the labor contract was "irrelevant" to the resolution of this dispute.

This Court uniformly has required exhaustion of labor contract remedies before any suit involving contract terms may be commenced. Nonetheless, the majority below erroneously permitted the suit to proceed without regard to the grievance and arbitration procedure set forth in the labor agreement.

This Court consistently has held that state substantive and remedial law cannot be an independent source of employee rights under collective bargaining agreements because Section 301 preempts such state laws. To hold otherwise, necessarily would undermine principles of uniformity and consistency which are cardinal to the application of federal labor law. However, the majority below wrongly substituted for the substantive law of the labor agreement a novel state tort theory of recovery.

Additionally, a majority of the court below erred by relying on preemptive principles under the National Labor Relations Act which have no relevance to Lueck's suit. The rights he asserts derive from a labor contract and are unique and individual. This is the essence of Section 301. Accordingly, the case should have been decided by the contract language and by its processes.

Finally, the decision below frustrates important national labor policies expressed in Section 301 and this Court's rulings with respect thereto. For uniformity and predictability based on the terms of the labor contract, the Wisconsin decision substitutes conflicting legal and remedial principles of state tort law. Instead of exhaustion of the contract's grievance and arbitration procedures, a union

employee is permitted to resort to civil litigation. The employer and union are thereby deprived of the fruits of their bargaining. Major incentives for reaching a negotiated settlement are dissipated and normal labor relations processes are disrupted. Consequently, this decision undermines the achievement and maintenance of industrial peace through collective bargaining.

For all these reasons, the decision below should be reversed and the judgment vacated.

ARGUMENT

I. THE WISCONSIN SUPREME COURT MAJORITY ERRED IN IGNORING AUTHORITATIVE PRINCIPLES OF SECTION 301 LAW AND FAILED TO RECOGNIZE THAT THESE PRINCIPLES PREEMPTED STATE LAW.

The undisputed facts of record establish that this is a Section 301 case pure and simple. As already noted, Lueck was a union employee. UAW Local 248 represented him and other employees for purposes of collective bargaining. The Union negotiated an agreement with Allis-Chalmers covering numerous terms and conditions of employment for Lueck and his co-workers. Among the provisions in the basic labor agreement are those requiring the establishment of a disability plan. The UAW and Allis-Chalmers negotiated such a plan. It contains provisions for temporary and long-term disability payments, eligibility requirements, the amounts thereof and the procedures to be followed in obtaining those benefits. Both the collective bargaining agreement and the disability plan contain grievance procedures culminating in final and binding arbitration.

Lueck sought and obtained temporary and long-term payments under these plan terms and the court below so found. His lawsuit concerns only alleged delays in the handling of his disability claim. Lueck did not attempt to grieve this issue. Nor did he allege or claim that he went to his union to inquire about the possibility of grieving. Instead, Lueck went directly to the Circuit Court of Wisconsin and commenced this lawsuit.

Although the Wisconsin Supreme Court thus was confronted with a classic Section 301 case, it failed to see it as such. Rather, relying on Wisconsin common law dealing with the obligations of insurance companies to insureds, a majority of the court concluded that Lueck's claim of bad

faith disability claims handling could be separately maintained in state court (Pet. Cert. App. 4-6).

The majority's decision is patently wrong as a matter of federal labor law. The majority, dealing with Section 301 in just three paragraphs (Pet. Cert. App. 4-6), simply ignored controlling principles of Section 301 doctrine which this Court has developed over many years.

A. The Failure Of The Majority To Apply Section 301 Law Undercut The Collective Bargaining Agreement And The Arbitral Process.

It is well established that Section 301 is more than a procedural grant of jurisdiction to the federal courts. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), so held. In the Court's view, Section 301 represented an expression of "federal policy that federal courts should enforce [collective bargaining] agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way." 353 U.S. at 455.[5] Critically, the Court also ruled "that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456.

In concert with the establishment of the principle that the collective bargaining agreement is the paramount source of the parties' rights under federal labor law came a number of decisions establishing arbitration as a centerpiece of

[5] The Court found one illuminating policy expressed in the legislative history to Section 301. It was the " '[s]tatutory recognition of the collective bargaining agreement as a valid, binding, and enforceable contract . . . [which] will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.' " 353 U.S. at 453 n.4.

collective bargaining.[6] Beginning with the *Steelworkers* Trilogy[7] and continuing through *Boys Markets*[8] the decisions consistently have emphasized that the parties' negotiated grievance and arbitration procedure is the indispensable ingredient in "the system of industrial self-government." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

The critical nature of grievance and arbitration procedures to the workings of unionized industry was indisputably confirmed in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). There the Court refused to allow the maintenance of a state court suit brought by a former bargaining unit employee to recover severance pay benefits owed pursuant to the terms of the negotiated agreement where he never attempted to use the agreement's grievance procedure. Noting that there might be limited circumstances when initial resort to the contractual means of redress could be excused, the Court nevertheless declared "... federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the con-

[6] These decisions are completely consonant with § 201(c) of LMRA, 29 U.S.C. § 173(d), dealing with federal mediation, which provides:

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

[7] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[8] *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

tract grievance procedure agreed upon." 379 U.S. at 652 (emphasis in original).[9] *See Vaca* v. *Sipes*, 386 U.S. 171 (1967), "[i]f the wrongfully discharged employee resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted." 386 U.S. at 184.[10] *See also, Boys Markets* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), holding that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, does not preclude a federal court from enjoining a strike in breach of a no-strike clause when the underlying dispute is subject to the contract's arbitration process.

[9] The policy reasons underlying this holding were articulated by Justice Harlan as follows:

> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." [Citation omitted].

379 U.S. at 653.

[10] Exhaustion of contract remedies is now a normal prerequisite to the maintenance of § 301 actions alleging a union's breach of its duty of fair representation and the employer's breach of contract. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1975); *Clayton* v. *Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 451 U.S. 679 (1971); *DelCostello* v. *Int'l Bhd. of Teamsters*, ____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed 2d 476 (1983).

Thus, after years "of litigating elucidation"[11] it is clear that Congress in Section 301, and this Court's rulings with respect to Section 301, make labor peace achieved through collective bargaining the touchstone of labor-management relations. The parties' negotiated agreement is the controlling legal document governing their relationship. Disputes necessarily arising from these contractual arrangements are to be resolved through the grievance and arbitration procedure, not by self-help or resort to the courts. Finally, the resulting arbitration award is to be enforced without judicial review "so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

B. The Majority Did Not Recognize That Section 301 Preempts The Application Of State Tort Law.

Section 301 does more than establish a uniform body of federal law based on national labor policy. It preempts. It makes federal, not state, law controlling in the regulation of rights derived from a collective bargaining agreement.[12] The preemption issue was squarely addressed in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). The Court there held that Section 301 did not allow an employer to maintain either a state tort or contract action (369 U.S. at 98 n.3) to recover damages for illegal strike activity, saying "[I]n a case such as this, incompatible doctrines of local law must

[11] Justice Frankfurter in *Int'l Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617, 619 (1958).

[12] Although this Court has permitted state courts to exercise concurrent jurisdiction in applying federal law under Section 301 to enforce contract rights, *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), the Wisconsin Supreme Court applied state tort, not federal labor law.

give way to principles of federal labor law [footnote citations omitted]." 369 U.S. at 102-103. Speaking for the majority, Justice Stewart further said:

> ... The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." [Citations omitted]. The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. ...
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

369 U.S. at 103-104.

Accord, Avco Corp. v. *Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557, *reh'g denied*, 391 U.S. 929 (1968) (state court injunction action brought to halt a

strike in violation of contract's no-strike clause is properly removable to federal court since § 301 law controls).[13]

With near unanimity the federal courts of appeal properly have followed this Court's lead. They have recognized that state law provides no ancillary rights or remedies where the cause of action essentially seeks enforcement of rights derived from collectively-bargained agreements.[14] *See Lamb* v. *Briggs Mfg., a Division of Celotex Corp.*, 700 F.2d 1092 (7th Cir. 1983); *Moore* v. *General Motors Corp.*,

[13] The recent decision in *Belknap, Inc.* v. *Hale*, — U.S. —, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983), holding that the National Labor Relations Act does not preempt a state suit for misrepresentation and breach of contract brought by permanent strike replacements who were dismissed when the dispute was settled, is inapposite for two reasons. First, the decision construes preemption principles developed under the NLRA, not § 301. As discussed, *infra* pp. 18-19, these two separate sources of federal preemption are doctrinally different. Secondly, the suit in *Belknap* was not based on a collective bargaining agreement. The permanent replacements displaced by returning strikers were not covered by a labor contract. Their lawsuit was solely predicated on written and oral promises unilaterally made by the employer to induce them to accept employment. Here, on the other hand, Lueck's state court tort action would not exist without the collective bargaining agreement which created his rights to disability benefits in the first place.

[14] A few lower courts have concluded that a state cause of action may exist even though it may parallel remedies under a collective bargaining agreement. *See Garibaldi* v. *Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3009 (June 27, 1984) (No. 83-2132) (suit for wrongful termination held not to be preempted by § 301 because employee's "whistle blowing" to state public health officials protected a vital public interest); *Peabody Galion* v. *Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Schaeffer* v. *General Motors Corp.*, 586 F. Supp. 870 (E.D. Mich. 1984); *Messenger* v. *Volkswagen of America, Inc.*, 585 F. Supp. 565 (S.D. W. Va. 1984) (each holding that § 301 does not preempt state

[footnote continued on p. 16]

739 F.2d 311, 317 (8th Cir. 1984), "'[S]ection 301 . . . reaches not only suits *on* labor contracts, but suits seeking remedies *for violation* of such contracts. . . . The issue is not the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought, . . . interpret a collective bargaining agreement.'" (Quoting with approval *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 380 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (emphasis in original)) (citations omitted); *Olguin* v. *Inspiration Consol. Copper Co.*, — F.2d —, 117 LRRM 2073 (9th Cir. 1984); *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984) (removal of state court suits to federal courts proper under Section 301 where dispute concerns employment and working conditions covered by collective bargaining agreements).

Nor should it matter that the plaintiff styled his action in tort rather than contract. So long as the underlying claim seeks enforcement of rights arising from a labor agreement, the cause is governed by Section 301 laws. *See, e.g., Moore*

[Continued]

tort action brought to contest retaliatory discharges for filing workers' compensation claims). *Accord, Midgett* v. *Sackett-Chicago, Inc.*, Nos. 59341, 59350, slip op. (Illinois Supreme Court, October 19, 1984).

These cases appear to go well beyond the holdings in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald* v. *City of West Branch, Michigan*, — U.S. —, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984). In each, express federal statutory rights were held not supplanted by remedies under collective bargaining agreements. Here, in contrast, Lueck's suit unquestionably seeks a remedy for rights which are conferred solely by the bargaining agreement and the purported state interest is an attenuated one at best.

v. *General Motors Corp.*, 739 F.2d 311; *Olguin* v. *Inspiration Consol. Copper Co.*, 117 LRRM 2073; *Buscemi* v. *McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984); *Viestenz* v. *Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982); *Fristoe* v. *Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980) (all holding various state tort actions by employees for "wrongful discharge", "intentional infliction of emotional distress", or fraud or misrepresentation preempted by Section 301).

In sum, a body of substantive federal labor law exists under Section 301. Its essence is the collective bargaining agreement and the arbitral process. Equally important, Section 301, under the preemption doctrine, precludes the application of inconsistent state law.

These principles clearly control here. Yet the majority below failed to apply them. Thus, the majority's decision fundamentally alters Section 301 law in the following respects: First, contrary to the express teachings of *Lincoln Mills* (353 U.S. 448) and *Lucas Flour* (369 U.S. 95), state tort law, rather than the parties' negotiated agreement, is made an independent source of legal right and remedy to an employee covered by a bargaining agreement. Second, tort liability may be determined without reference to the provisions of the underlying agreement even though the tort cause of action itself never would have existed absent the agreement. Third, the agreement's grievance and arbitration procedure, heretofore the chosen instrument of assuring industrial peace in an unionized plant, is seemingly relegated to legal limbo. Lastly, the majority's decision permits extra-contractual remedies to be fashioned without consideration of whether the employee ever resorted

to or exhausted his contract remedies.[16] The Wisconsin Supreme Court's decision represents an unwarranted and unwise instrusion upon national labor policy and law.

C. The Majority's Decision Confuses Discrete Principles Of Preemption Law.

Despite the clear applicability of Section 301, the majority held that it did not control. Instead, the court relied on National Labor Relations Act preemption doctrine as dispositive of the preemption issue in this case. It is not.

First, there is no factual basis for concluding that employee rights protected under Sections 7 and 8 of the NLRA are involved even tangentially.[16] Lueck's claim involves individual and personal rights predicated solely on a collective bargaining agreement. Moreover, Lueck has never claimed that he was acting either alone or in concert to further employee rights protected by Section 7 or to remedy conduct prohibited by Section 8. Accordingly, there was no factual reason to consider or apply NLRA preemption law because Lueck does not assert claims arguably within the purview of the National Labor Relations Act. *Cf. San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959).

Next, as a matter of law, NLRA preemption doctrine has no place here. Early in its interpretations of Section 301, the Court emphasized the crucial distinction in preemptive

[15] Lueck here seeks and the majority's opinion permits recovery of punitive, compensatory and pain and suffering damages alleged to be $310,000, *supra* p. 4.

[16] Section 7 of the NLRA, 29 U.S.C. § 157, protects employee rights to organize and bargain collectively and to refrain from these activities. Section 8 of the NLRA, 29 U.S.C. § 158, prohibits and makes unfair labor practices a wide variety of employer and union activity which interferes with these protected rights.

principles under Section 301 and the NLRA. Thus, in *Lucas Flour*, 369 U.S. 95, 101 n.9, the Court said:

> Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the preemptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. [Citation omitted].

See also, Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962) ("the union also argues that the preemptive doctrine of . . . *Garmon* . . . prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable.").[17]

Thus, on both factual and legal grounds the majority erred in looking to NLRA preemption principles for guidance. The state tort asserted here is inseparably intertwined with the collective bargaining agreement and therefore is governed by Section 301 preemption law.

II. THE MAJORITY'S DECISION ERODES NATIONAL LABOR POLICY DEVELOPED UNDER SECTION 301.

Section 301 law rests on a bedrock of national policy—that industrial peace can best be achieved by making the parties' collective bargaining agreement, including the

[17] The NLRA preemption cases cited by the Wisconsin Supreme Court majority, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978); *Farmer* v. *Carpenters*, 430 U.S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958); and *United Constr. Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656 (1954) (Pet. Cert. App. 7, 8, 10-13) are irrelevant here. All involve alleged tortious conduct by either an employer or union which was arguably within the purview of the NLRA. The supposed tort of bad faith claims processing asserted here is not.

agreement's internal dispute-settling mechanism, the primary source of both their law and their means of resolving disputes (*see* discussion, *supra* pp. 10-13). Federal labor law governs to assure the contracting parties that their contractual arrangements will be uniformly and consistently interpreted. *Lincoln Mills*, 353 U.S. 448, 452; *Lucas Flour*, 369 U.S. 235, 245-46. Although absolute identity between federal and state law is not demanded, "to the extent that widely disparate remedies . . . remain available in state, as opposed to federal, courts, the federal policy of labor law uniformity . . . is seriously offended." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 245-46 (Brennan, J., for the majority).

The Wisconsin Supreme Court's decision plainly affronts these policies.

First, contrary to *Lincoln Mills*, 353 U.S. 448, and *Lucas Flour*, 369 U.S. 95, the court below ignored the UAW-Allis-Chalmers agreement. It was declared to be "irrelevant to the issue of whether defendants exercised bad faith" in disability claims handling (Pet. Cert. App. 6). To adopt the Wisconsin Court's view "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements . . . [since] neither party could be certain of the rights which it had obtained or conceded . . . ." *Lucas Flour*, 369 U.S. at 103.

Second, the court below disregarded the parties' grievance and arbitration procedure. As a result, the "employer and union [are deprived] of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.

Enormous practical implications to the workings of labor relations in a unionized environment flow from the latter determination. Thus, day-to-day decisions involving routine matters of contract administration as well as issues of greater substance may be subject to a direct or collateral state court attack by any employee who is neither required to file a grievance before this challenge is made nor directed to seek the assistance of the bargaining representative to invoke contractual processes. Consequently, no opportunity exists for the union and the employer to resolve the issue in the normal course of their labor relations activities. *A fortiori*, no independent arbiter will be presented with the issue or allowed to apply his unique expertise to dispose of the matter. The entire dispute is left in the lap of a state court. Moreover, according to a majority of the court below, the state court is free to fashion its own brand of justice without consideration of the labor agreement.

There was no reason for the Wisconsin Court to reach this result. Issues similar to those raised by Lueck may and do arise with respect to numerous similar labor contract matters. Wage, holiday, vacation, life and health insurance, and pension provisions in collective bargaining agreements all mandate timely disbursements of the respective amounts due.[18] If delays or interruptions occur in their processing, the anticipated and usual course of action is for the matter to be raised by the exclusive bargaining representative and discussed with the employer even before the filing of a formal grievance. Issues of this type typically

[18] Analogous contractual provisions requiring the posting of job vacancies within a certain number of days, the furnishing of grievance answers in a set time period, etc. exist throughout American industry. *See* 2 *Collective Bargaining Negotiations and Contracts* at 51:61-51:64 and 75:241-75:244 (BNA 1981). They assure and require efficient and timely performance of contract obligations.

are resolved by precisely such informal methods of conference and persuasion.

The matter, moreover, need not end with informal discussion. The union still may file a formal grievance on behalf of the aggrieved employee or employees and the union itself is subject to independent sanction for a wrongful failure to do so. *See Vaca* v. *Sipes*, 386 U.S. 171, 185. Nor does the filing of a written grievance halt the union-employer dialogue. Grievances often are settled before arbitration through additional efforts at adjustment and compromise.[19] Indeed, the existence of arbitration as the industrial court of last resort acts is an inducement for these pre-arbitral resolutions.

Finally, there is arbitration itself. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597.

Clearly, an arbitrator would have had the remedial power to dispose of the disability claims dispute involved in this case. Finding a contractual violation, the arbitrator could order specific performance of the disability claims payment procedure. The arbitrator also could have ordered that

[19] According to the American Arbitration Association, approximately 47% of cases filed with it for arbitration in the twelve-month period ending October 31, 1983, were settled or otherwise disposed of without a hearing. *Minutes of Labor Section of the Arbitration Practice Committee, American Arbitration Association* (November 22, 1983) (available from the American Arbitration Association, New York, New York 10020). Other authorities place the figure much higher. *See* Baer, *Winning in Labor Arbitration* 6 (Crain Books, 1982).

Lueck be made whole for a payment or payments not made or delayed, if that was the case, and impute interest to those amounts. Generally speaking, the arbitrator's remedial mandate is to "make whole", and arbitrators frequently do just that.[20]

In addition to undercutting the negotiated agreement and its own settlement mechanisms, the court below allowed the maintenance of this suit even though it sought compensatory, punitive, and pain and suffering damages, remedies not available under the labor contract.[21] A remedial scheme so at variance with that established by the parties works directly contrary to the policies encouraged by Section 301. It deprives the union of its ability to act as exclusive bargaining representative and it undercuts the employer's interest and desire to agree to a system which limits an aggrieved employee's choice of remedies. *See Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.[22]

Lastly, uniformity in the administration of labor agreements under preemptive federal labor law is sacrificed in the cause of a relatively parochial state interest. Thus, if the decision below is permitted to stand, other states with similar interests in analogous employment situations would be left free to create their own legal rights and remedies without regard to the collectively-bargained agreements creating them. Ultimately a hodgepodge of state law would govern the meaning of those agreements, not a uniform body of federal law.

[20] For a scholarly exploration of the breadth and use of arbitral remedies, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 781-92 (1973) and arbitration awards there cited. *See also*, Elkouri and Elkouri, *How Arbitration Works* 351-53 (3d Ed. 1973).

[21] *See* Feller, *op. cit., supra* at 788-90.

[22] *See* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 6-8 (1958).

CONCLUSION

For the foregoing reasons, the Wisconsin Supreme Court's decision of January 31, 1984, should be reversed and its judgment vacated.

Respectfully submitted,

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v.

RODERICK S. LUECK,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States ("the Chamber") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of Petitioner. Consent to the filing of this brief has been obtained from counsel for Petitioner. Counsel for Respondent has refused consent.

The Chamber, a non-profit membership organization, is the nation's largest federation of corporations, trade associations, state and local chambers of commerce and

individuals engaged in business and the professions. It has a direct membership in excess of 182,000.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes an important aspect of the Chamber's activities and includes participation as *amicus curiae* in significant cases before this Court.

Many of the Chamber's members are parties to collective bargaining agreements. The overwhelming majority of those agreements include or reference negotiated health, disability, pension and other benefits. Virtually all also include grievance and arbitration procedures for the settlement of disputes arising out of the contract, including disputes relating to benefits. Accordingly, the Chamber is peculiarly able to present to the Court the views of the business community on the issue in this case: whether an employee can maintain an independent state tort action based on an alleged failure to pay a disability benefit in a timely fashion, where the right to the benefit is established under the collective bargaining agreement, and where the employee has sidestepped the grievance and arbitration procedures agreed upon by the parties to resolve such disputes. Resolution of this question is vital to the interpretation and application of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and significantly affects employees, employers and labor organizations throughout the country.

The decision of the Wisconsin Supreme Court disregards the well-established body of law that has developed under Section 301. It concludes, despite the undisputed relationship of Roderick Lueck's claim to the collective bargaining agreement and despite the existence of mandatory grievance and arbitration procedures for the resolution of disputes arising out of the agreement, that he may maintain a tort action for the alleged bad faith handling of his disability insurance claim. In so doing, the Wisconsin court ignores the national labor policy and the prior holdings of this Court establishing a uniform federal labor law. It injects instead uncertainty, inconsistency and conflict. The ramifications of this case, both within and without the State of Wisconsin, will be significant to the Chamber's members. It is for this reason that the Chamber requests permission to submit its views.

WHEREFORE, the Chamber respectfully requests that its Motion be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether federal labor law and policy under Section 301 of the Labor Management Relations Act preempts a tort action based on state law brought by a union employee against his employer for bad faith delay in making disability benefit payments when (1) the disability plan giving rise to benefits is embodied in a collective bargaining agreement and (2) the employee never used the contractual grievance procedure to seek redress.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States ("The Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner, to which this brief is attached.

SUMMARY OF ARGUMENT

By authorizing a union-represented employee to pursue a state tort action for bad faith, based on an alleged delay in the payment of a disability benefit, when

the benefit is a part of a collective bargaining agreement, a divided Wisconsin Supreme Court ignored long-standing principles of federal labor law and the national labor policy. It failed to recognize that, because of the need for a uniform federal labor law, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, governs all rights and claims, such as the one in issue here, arising from a collective bargaining agreement. State law, like the Wisconsin tort law invoked by employee Roderick Lueck, is preempted as an independent source of rights.

The decision below thwarts the national labor policy because it allows an employee covered by a collective bargaining agreement to avoid a mandatory grievance and arbitration procedure established by the union and employer for the resolution of disputes arising out of the contract and, instead, proceed to court, simply by styling his claim in tort, rather than contract. In so doing, the Wisconsin court permits a state court to interpret a collective bargaining agreement. It thus denies the employer the benefit of his bargain. Finally, the decision makes possible conflicting state law enforcement of contractual obligations based on localized determinations as to the standard of conduct imposed by collective bargaining agreements.

ARGUMENT

I. AN INDEPENDENT STATE TORT CLAIM BROUGHT BY AN EMPLOYEE COVERED BY A COLLECTIVE BARGAINING AGREEMENT FOR VIOLATION OF A RIGHT OR DUTY CREATED BY THAT AGREEMENT IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

Suits to interpret and enforce rights created by a collective bargaining agreement in an industry affecting commerce are governed by Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).[1] That section reflects federal policy that industrial peace is best achieved by federal enforcement of such agreements. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Accordingly, the substantive law to be applied in such suits is "federal law which the courts must fashion from the policy of our national labor laws." *Id.* at 456.[2]

While federal interpretation of the federal law will govern, "state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Textile Workers Union v. Lincoln Mills of Alabama*, *supra*, at 457. However, any state law applied "will be absorbed

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[1] Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

[2] This is true whether the Section 301 action is brought in federal or state court. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

as federal law and will *not* be an *independent* source of rights." *Id.* (Emphasis added.)

Where state law is not absorbed as federal law, national labor policy mandates its preemption: "[D]octrines of federal labor law [are] uniformly to prevail over inconsistent local rules." *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company*, 369 U.S. 95, 104 (1962). This is so because "the possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and the administration of collective bargaining agreements." *Id.* at 103. As this Court recognized:

> The importance of the area which would be affected by separate systems of substantive [labor] law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id. at 104.

Clearly, Section 301 is not to be given a narrow reading. *Smith v. Evening News Association*, 371 U.S. 195 (1962).[3] It controls *all* actions involving the interpretation and application of "rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce" and preempts all parallel state claims. *Avco Corp. v. Aero Lodge No. 735, IAM*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968) (Section 301 preempted state contract action to enforce a no-strike clause). It controls this case.[4]

Lueck was entitled to disability benefits *only* by virtue of negotiated language in the collective bargaining agreement establishing employee rights to such benefits. Whether benefits were to be paid to him; when benefits were to be paid to him; how benefits were to be paid to him; what benefits were to be paid to him are all matters governed by the collective bargaining agreement. As the

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[3] Indeed, so vast is its reach that even suits to vindicate individual employee rights arising from a collective bargaining agreement are deemed Section 301 actions. *Smith v. Evening News Association*, 371 U.S. 195 (1962). A contrary conclusion would have "stult[ified] the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Id.* This Court has therefore found Section 301 controlling in suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge, *see, e.g., Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *General Electric Co. v. Local 205, United Electrical, Radio and Machine Workers of America*, 353 U.S. 547 (1957); to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, *see, e.g., Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); to recover wage increases in a contest over the validity of the collective bargaining contract, *see, e.g., Charles Dowd Box Co. v. Courtney, supra*; to suits against individual union members for violation of a no-strike clause contained in a collective bargaining agreement, *see, e.g., Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962); and to suits by former employees over the continuation of health insurance benefits, *see, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), among others.

[4] Since this is "a suit for violation of a collective bargaining contract within the purview of § 301(a) . . . the preemptive doctrine of cases such as . . . [*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)] . . . , based on the exclusive jurisdiction of the National Labor Relations Board, is not relevant." *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company*, 369 U.S. 95, 102 n.9 (1962). *See Vaca v. Sipes*, 371 U.S. 195 (1967). As a result, the lower court's reliance on *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); and *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954) is misplaced.

dissent below recognized, any claim concerning the payment of disability benefits to Lueck "depends entirely on the labor contract. . . ." (Pet. Cert. App. 19). Indeed, even as the court below attempted to distance Lueck's claim from the collective bargaining agreement, it conceded that "[f]or purposes of pursuing this claim, Lueck need . . . first establish that the defendant owed him a duty by *virtue of the insurance contract*," which was a part of the collective bargaining agreement. (Pet. Cert. App. 5, emphasis added). To say that the claim in this case is somehow separate and apart from the contract is thus pure sophistry.

Nor can Lueck's description of his claim as a tort avert the preemptive sweep of Section 301.[5] What a plaintiff calls his claim is irrelevant. "[S]ection 301 . . . reaches not only suits on labor contracts, but suits seeking remedies *for violation* of such contracts." *Wilkes-Barre Publishing Co. v. Newspaper Guild, Local 120*, 647 F.2d 372, 380 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (emphasis in original). The determining factor is not "the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought . . . *interpret a collective bargaining agreement*."[6] *Id.* at 380 (emphasis added).

The Eighth Circuit recently followed this guidance, perceiving that it is the substance of a claim and not its title which must determine whether state tort claims are within the purview of Section 301. In *Moore v. General Motors Corp.*, 739 F.2d 311, 316 (8th Cir. 1984), the appellate court affirmed the dismissal of claims for fraud

[5] Obviously, a plaintiff's failure to cite Section 301 in no way minimizes "the force of Federal preemption in this area of labor law." *Avco Corp. v. Aero Lodge No. 735, IAM*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

[6] *See also Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 684 (1983).

and misrepresentation regarding transfer rights, brought by a union-represented employee, stating:

> Moore has attempted to characterize her claims as a tort action rather than a violation of the Collective Bargaining Agreement; however, we agree with the district court's conclucion that the rights on which Moore bases her claims arise from the Collective Bargaining Agreement . . . [and] are governed by federal law.

Similarly, in *Redmond v. Dresser Industries, Inc.*, 734 F.2d 633 (11th Cir. 1984), the Eleventh Circuit held that state law claims for breach of contract, fraud, outrage and bad faith asserted by an individual formerly covered by a collective bargaining agreement were based on the individual's layoff from his job and the company's refusal to reinstate him to the bargaining unit and therefore arose under the agreement. Accordingly, the suit was governed by Section 301, and principles of federal law prevailed over state. *See also Olguin v. Inspiration Consolidated Copper Company*, 740 F.2d 1468 (9th Cir. 1984); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980) (wrongful discharge claims governed by Section 301).[7]

[7] Numerous lower courts have also recognized that state tort claims based upon rights arising out of collective bargaining agreements must stand or fall under Section 301. *See, e.g., Moore v. Kaiser Foundation Hospitals*, 116 L.R.R.M. (BNA) 2691 (N.D. Cal. 1983), *aff'd*, 117 L.R.R.M. (BNA) 2688 (9th Cir. 1984) (claims for wrongful termination, constructive discharge, breach of good faith and fraud were preempted by federal labor law under Section 301, where the causes of action "flow[ed] as a mere incident of plaintiff's termination rather than as a result of independent conduct"); *Mason v. Continental Group, Inc.*, 569 F. Supp. 1241 (N.D. Ala. 1983) (cause of action for fraudulent misrepresentation was treated as a Section 301 claim); *Brice v. McDonnell Douglas Corp.*, 111 L.R.R.M. (BNA) 2081 (C.D. Cal. 1982) (claims of breach of contract, wrongful termination, wrongful interference with a business relationship, inducing breach of contract, misrepresentation,

These courts recognized what the Wisconsin court did not: National labor policy requires that disputes arising from collective bargaining agreements, regardless of what they are called, be governed by a uniform federal substantive law. Absent this rule, federal labor law would be less certain; collective bargaining more difficult; and industrial peace more threatened. Accordingly, where, as here, it is the labor contract which creates the right in issue—and, in fact, the method for resolving any dispute concerning the right—independent state causes of action cannot exist.

II. ALLOWING AN EMPLOYEE COVERED BY A COLLECTIVE BARGAINING AGREEMENT TO PURSUE AN INDEPENDENT STATE TORT ACTION TO RECOVER FOR AN ALLEGED BREACH OF A RIGHT CREATED BY THAT AGREEMENT WOULD SUBVERT THE NATIONAL LABOR POLICY.

If the decision of the court below is allowed to stand, one of the linchpins of national labor policy—a collectively bargained grievance and arbitration procedure as the exclusive means of dispute resolution—will have been removed. Moreover, once the linchpin has been discarded, courts in all localities may consider themselves free to recognize analogous causes of action for the alleged violation of rights created in collective bargaining agreements and, by interpreting those agreements, to imply contract terms which the parties have not negotiated. Collective bargaining, long recognized by Congress and this Court as the means to industrial peace, will thus be hampered.

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and intentional infliction of emotional distress dismissed, since those claims were inextricably intertwined with the collective bargaining agreement); *Reese v. Mead Corporation*, 79 Lab. Cas. (CCH) ¶ 11,732 (N.D. Ala. 1976), *aff'd*, 79 Lab. Cas. (CCH) ¶ 11,733 (5th Cir. 1976) (fraud claims based on statements about seniority and pension benefits made by the employer "in and about the collective bargaining agreement" were sufficiently bound up in the collective bargaining agreement to require the application of federal labor law).

Virtually all collective bargaining agreements, like the one in issue here, include grievance and arbitration procedures as the exclusive vehicles of dispute resolution.[8] This Court has consistently recognized that such procedures are at the heart of our national labor policy.[9] The agreement to arbitrate disputes "is the *quid pro quo* for an agreement not to strike . . . ." and is thus the glue of industrial peace. *Textile Workers Union v. Lincoln Mills of Alabama*, *supra*, at 455. Said otherwise, "Arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 578 (1960). Indeed, so essential to the national labor policy is the grievance and arbitration procedure that the arbitration clause should be *presumed* to embrace the parties' dispute; "doubt should be resolved in favor of coverage". *Id.*

Unless grievance and arbitration procedures are specified as non-exclusive, a party must attempt to exhaust them before proceeding with a Section 301 suit. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). According to this Court, a rule allowing an employee to sidestep the grievance procedure in favor of a lawsuit would "inevitably exert a disruptive influence upon both the nego-

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[8] A recent sample survey found that 100% of collective bargaining agreements had grievance and arbitration provisions. 2 Collective Bargaining Negotiations and Contracts (BNA) 40:1, 51:1 (1984).

[9] *See, e.g., Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *See also* Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), which provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desired method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

tiation and administration of collective agreements." *Id.* at 653, quoting *Teamsters v. Lucas Flour Company*, *supra*. If employees were permitted to file lawsuits without prior recourse to available contract remedies, "an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures" for certain types of claims or entirely. *Republic Steel v. Maddox*, *supra*. Such a result would not advance the national labor policy. *Id.*

Because of the critical importance of the grievance and arbitration procedure, this Court has allowed exceptions to the rule requiring exhaustion of these procedures only rarely and on grounds consistent with the national labor policy. Thus, if an employee establishes that his union breached its duty of fair representation in the handling of a grievance, the union's breach "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). *See Vaca v. Sipes*, 386 U.S. 171 (1967). Further, this Court has recognized that the sanctity of the grievance and arbitration mechanism is not controlling where federal statutes which provide minimum substantive guarantees to individuals and which were intended to be judicially enforceable are in issue. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitrator's decision would not bar a lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (arbitrator's award did not preclude a private action by employees under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*); *McDonald v. City of West Branch, Michigan*, —— U.S. ——, 104 S. Ct. 1799 (1983) (arbitrator's award was not res judicata of claim under 42 U.S.C. § 1983). "[A]rbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." *McDonald v. City of West Branch, Michigan*, *supra*, at 1803 (1983).

Clearly, neither of these exceptions is applicable here. There has been no allegation that the Union represented Lueck discriminatorily or in bad faith. Nor is there any federal statutory right in issue. Rather, this case involves a right to disability benefits which exists *only* because of the specific terms of a collective bargaining agreement. This is precisely the sort of claim which the grievance-arbitration mechanism is designed and intended to handle.[10] Yet, Lueck declined to follow the contractually agreed-upon procedure, and the court below has sanctioned his choice.

The decision of the Wisconsin court thus constitutes a serious and improper foray into federal labor law and the national labor policy. In essence, the court has conceived a new and potentially limitless exception to the rule of *Republic Steel v. Maddox*.[11] Simply by alleging

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[10] Indeed, disputes relating to the payment of disability and similar benefits are routinely processed through grievance and arbitration procedures. *See, e.g., Duriron Company, Inc.*, 80 Lab. Arb. (BNA) 859 (1983) (Rybolt, Arb.); *Cresso Manufacturing Co.*, 79 Lab. Arb. (BNA) 1220 (1982) (Cohen, Arb.); *Brockway Glass Company, Inc.*, 77 Lab. Arb. (BNA) 113 (1981) (Teple, Arb.). In fiscal year 1982 alone, 241 arbitration awards involving health, welfare, pension and other fringe benefits were issued under the auspices of the Federal Mediation and Conciliation Service ("FMCS"). *See* FMCS, Management Information Systems, Arbitration Statistics (1982). Moreover, Section 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1133, mandates the establishment of internal remedies for disputes surrounding a denial of benefits. An attempt to exhaust these remedies must be made before resort to the courts. *See, e.g., Kross v. Western Electric Company, Inc.*, 701 F.2d 1238 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980).

[11] Even as the Wisconsin court seeks to frustrate national labor policy by casting aside mandatory grievance and arbitration procedures to permit a state tort action based on a collective bargaining agreement, the National Labor Relations Board is reconfirming the critical role in the national labor policy of private dispute resolution

that his claim, albeit grounded in the collective bargaining agreement, states an independent state tort cause of action, an employee may ignore the procedures adopted by the parties for resolution of disputes arising under the agreement. The impact of such a result on the mandatory and exclusive grievance and arbitration procedures is plain.[12]

Moreover, the lower court has directly sanctioned intrusion into the collective bargaining process.[13] By allowing the litigation to proceed, it has explicitly granted Wisconsin courts the right to decide what standard of good faith dealing is required under a collective bargaining agreement which provides disability benefits. It has authorized state court interpretation of a collective bargaining agreement. This, however, is not the bargain the employer and the union struck.

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mechanisms. For example, in *United Technologies Corp.*, 268 N.L.R.B. No. 83 (1984), revising an earlier position, the Board indicated that pre-arbitration deferral to arbitration is appropriate in situations involving alleged violations of employee rights if they are cognizable under grievance and arbitration provisions. The Third Circuit has heralded this decision as a "more realistic approach toward private resolution of disputes." *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 124 (3d Cir. 1984). Similarly, the Board has expanded the situations in which post-arbitration deferral will be considered appropriate. In *Olin Corporation*, 268 N.L.R.B. No. 86 (1984), the Board held deferral will be appropriate if: (a) the proceedings appear to have been fair and regular; (b) all parties have agreed to be bound; (c) the contractual dispute is factually parallel to the alleged unfair labor practice; (d) the arbitrator is generally presented with the facts relevant to resolving the alleged unfair labor practice; and (e) the arbitrator's award is not clearly repugnant to the National Labor Relations Act.

[12] Indeed, if states are allowed to thrust themselves into the arena of labor relations in this fashion, an employer will have little incentive to enter into all-encompassing grievance and arbitration procedures.

[13] "Invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. ——, 104 S. Ct. 1505, 1511 (1984).

Congress, as this Court has recognized, left employers and unions free "to establish, through collective negotiation, their own charter for the ordering of industrial relations." *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). *See Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company, supra*, at 104. Recognizing that national labor policy is predicated on the concept of free collective bargaining, this Court has not hesitated to strike down attempts to regulate such conduct. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). *See also Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Clearly then, allowing state courts, under the guise of resolving bad faith tort actions, to set standards for the administration of a clause of a collective bargaining agreement—a task committed by the parties to an arbitrator—represents the very infringement that Congress and this Court have cautioned against.[14]

Finally, while the intrusion into the federal labor law here seemed minor to the court below, its ramifications are of major proportions. States would not be restricted to allowing tort actions relating to problems in the payment of disability benefits. Thus, those with localized concerns involving other matters covered by collective bargaining agreements might also deem independent tort actions appropriate. It takes little imagination to envision state tort actions for bad faith, emotional distress, harassment, or outrageous conduct derived solely from an employer's errors or delays in awarding vacation, holiday or severance pay, in computing seniority, in

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[14] Such infringement carries substantial risks for the collective bargaining process. An employer might decide that rather than expose itself to the vagaries of independent state court litigation—and the attendant possibility of punitive damages—it would be best to resist or limit union demands in the collective bargaining process to provide disability or other benefits.

making job assignments, or in otherwise administering the collective bargaining agreement.[15] Uniformity in the administration of contracts would become a memory; inconsistency, the reality.[16]

In sum, where this Court has consistently required resort to the exclusive dispute resolution procedures established by the parties in the course of collective bargaining, the Wisconsin court now allows artful pleading to avoid such procedures. Where this Court has consistently required arbitral—rather than judicial—interpretation of collective bargaining agreements, the Wisconsin court now allows state courts to construe such agreements. Where this Court has consistently required

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[15] The proliferation of litigation involving allegations of wrongful termination in violation of state public policy also raises troublesome issues. *See generally*, Berger, "Defining Public Policy Torts in At-Will Dismissals," 34 Stan. L. Rev. 153 (1981). Some courts have allowed such suits by employees who are covered by collective bargaining agreements containing grievance and arbitration procedures. *See, e.g., Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *petition for cert. filed*, No. 83-2132 (June 27, 1984); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Midgett v. Sackett-Chicago, Inc.*, Nos. 59341, 59350 slip op. (Ill., Oct. 19, 1984). While substantial preemption issues are raised by such cases, the resolution of this case does not require the Court to determine the limits of state court jurisdiction over such disputes. In those cases, any right or benefit accorded under the state's public policy was entirely independent of the collective bargaining agreement; here, the cause of action arises only *because* of the agreement. In other words, without the collectively bargained agreement, and the rights it created, Wisconsin would have had no interest in Mr. Lueck's receipt of disability benefits.

[16] Moreover, a multi-state employer, whose employees are all covered by one national negotiated benefit plan, could, under the Wisconsin court's decision, have differing liabilities under the same contract provisions depending on the state in which the complaining employee is based. Similarly, employees covered by "master" contracts entered into by employers and unions could have different rights depending solely on the location of the facilities in which they work. National labor policy would be severely undercut by such results.

application of a uniform federal labor law in matters arising out of collective bargaining agreements, the Wisconsin court now allows states to apply their own localized law to resolve such concerns.

The choice is clear. Affirmance of the lower court's decision will authorize state courts to interpret collective bargaining agreements and to set standards of conduct for applying the provisions of such agreements. Reversal, on the other hand, will underscore the importance of arbitration to the national labor policy and reaffirm the preemptive sweep of Section 301 against state intrusion.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for Petitioner, the Chamber requests that the decision of the Wisconsin Supreme Court be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLIS-CHALMERS CORPORATION,
Petitioner,

v.

RODERICK S. LUECK,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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IN THE
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No. 83-1748

ALLIS-CHALMERS CORPORATION,
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Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

MOTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIGATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of said brief, but respondent has declined to do so.

The AFL-CIO is a federation of 95 national and international labor organizations representing approximately

13,000,000 employees throughout the United States. At issue in this case is the extent to which the states may, through application of their own laws, define the legal obligations of parties to a collective bargaining agreement and determine the legal consequences to the parties of a breach of those obligations. That question is of vital importance to the labor movement.

It is the position of the AFL-CIO, developed in the accompanying brief, that under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, it is for federal law—and federal law alone—to determine the legal consequences to the parties of entering a collective bargaining agreement. The states are not free to imply contractual duties from such an agreement, they are not free to impose tort-law duties as a consequence of the relationship established by the collective agreement, and they are not free to apply state law to remedy breaches of duties flowing from the agreement. Under this rule, respondent's claim in this case is pre-empted.

We recognize, of course, that the result of our position in this case is that the state is precluded from imposing a duty on an employer who is a party to a § 301 contract, even though state law would impose such a duty on an employer who was party to a non-§ 301 agreement; in other cases, our argument would preclude states from using § 301 contracts to impose duties on employees working under such agreements, but not on other employees. In our view, those are the necessary consequences of Congress' decision to federalize the law of contracts as it applies to collective bargaining agreements, but not as it applies to other types of employment contracts. And we believe that that congressional decision best serves the system of collective bargaining and thus ultimately the interest of employees and employers alike.

In order to develop the position set forth above, the AFL-CIO seeks leave to file the attached brief *amicus curiae*.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1748

ALLIS-CHALMERS CORPORATION,
Petitioner,

v.

RODERICK S. LUECK,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* contingent upon granting of the motion to file said brief. The interest of the AFL-CIO as *amicus curiae* is set forth in the motion.

SUMMARY OF ARGUMENT

In the National Labor Relations Act ("NLRA"), Congress established a system of collective bargaining with respect to wages, hours, and working conditions. Congress did not indicate to what extent it intended to preclude state regulation of those matters. This case raises one facet of that question.

In the main, the Court's approach to that issue has been to refrain from attempting to decipher the NLRA's silence and instead to look for "more reliable indicium of congressional intent" in other federal laws bearing on the particular form of regulation at issue. *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). Pp. 4-6 *infra*. That approach is appropriate here as well.

Through its cause of action for breach of the duty of good faith, Wisconsin has imposed a duty on the employer that is "rooted in" a collective bargaining agreement and that arises "as a consequence of the relationship established by contract." Pp. 6-9 *infra*. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, speaks specifically to regulation of this character: it decrees that the legal obligations of the parties that flow from entering into a collective bargaining agreement and the legal consequences to the parties of breaching any of those obligations are to be determined exclusively by federal law. That is the square holding of *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Pp. 9-11 *infra*.

As *Lucas Flour* illustrates, one aspect of the role of federal law under § 301 is to decide what legal duties are to be implied from a collective agreement. Thus, had respondent's claim in this case been pleaded as a claim for breach of a contractual duty of good faith implied in law from the collective bargaining agreement, there would be no question but that federal law plainly would have controlled.

That respondent instead pleaded what Wisconsin denominates a tort-law claim for breach of a legal duty of good faith imposed "as a consequence" of the collective agreement makes no difference. In a context like the present, tort and contract law serve the unitary function of defining the legal consequences of particular relationships that parties voluntarily create. From the perspective of the parties to the contractual relationship, there is little difference between a contractual duty "implied in law" from the contract and a tort-law duty imposed by law "as a consequence" of the contract. And from the perspective of the collective-bargaining system, the threat that would be posed to its functioning by application of the differing contract laws of the several states is no less grave when state tort laws are involved. Thus, regardless of the rubric under which state law is invoked, § 301 precludes state regulation of the legal consequences to the parties of entering into a collective bargaining agreement. Pp. 11-16 *infra*.

There is a second and independent reason why the cause of action for bad faith is pre-empted here. Despite the Wisconsin Supreme Court's protestations to the contrary in its decision in the instant case, it is clear from that decision—and from all other Wisconsin precedents—that the tort of bad faith exists to afford special, extra-contractual damages for willful breaches of contracts of insurance. But under § 301, it is for federal law to determine the remedies to be afforded for a breach of a collective bargaining agreement. Section 301 leaves no room for the states to apply their own rules of remediation to breaches of collective bargaining agreements, which is precisely what Wisconsin has attempted to do here. Pp. 16-20 *infra*.

The disposition that should be made of respondent's complaint is clear. Viewed as alleging a state-law claim, the complaint must be dismissed as pre-empted for the reasons just stated. And viewed as alleging a federal claim under § 301, the claim must be dismissed because respondent did not exhaust his remedies under the grievance-arbitration procedure established by the collective bargaining agreement to resolve disputes arising under that agreement. Indeed, the fact that under Wisconsin law respondent would not be required to exhaust those remedies before litigating his bad faith claim only magnifies the conflict with federal law and provides added reason for concluding that the state cause of action is pre-empted. Pp. 20-21 *infra*.

ARGUMENT

A. This case presents the Court with a relatively rare "variant of [the] familiar theme," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959), that a state cause of action is pre-empted by the national labor laws.[1] But because the state is here regulating the substance of employees' terms and conditions of employment, this case is in the line from *Terminal Ass'n v. Trainmen*, 318 U.S. 1 (1943), to *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)—the line of cases that address the extent to which Congress, in establishing a system of collective bargaining with respect to wages, hours and working conditions, intended to preclude state regulation of those matters. Those cases reveal the delicacy and difficulty of that inquiry.

As the Court recognized in *Terminal Ass'n v. Trainmen*, *supra*, "[s]tate laws have long regulated a great variety of conditions in . . . industry," and "it cannot be that the minimum requirements laid down by state authority are all set aside" by federal law, *id.* at 6-7; such a rule would mean, for example, that state workers compensation laws and child labor laws—two leading examples of longstanding state regulation of the terms and conditions of employment—would be pre-empted. Yet, on the other hand, it is equally inconceivable that the states are wholly free to "limit[] the solutions that the parties' agreement can provide to the problem of wages and working conditions." *Teamsters Union v. Oliver*, 358 U.S. 283, 295-96 (1959).

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[1] To deal with the usual variants of that theme, the Court "ha[s] announced two doctrines for determining whether state regulations or causes of action are pre-empted by the NLRA," the *Garmon* doctrine and the doctrine of *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). *See Belknap Inc. v. Hale*, —— U.S. ——, 51 L.W. 5079, 5081 (June 30, 1983).

The difficulty of determining how far the federal labor laws pre-empt state substantive regulation of the terms and conditions of employment is greatly magnified by the fact that those laws are generally silent on the matter. As the Court said in *Malone v. White Motor Corp.*, 435 U.S 497 (1978), in which a claim was made that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), pre-empted the states from regulating employee pension plans:

> There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the [state law] is pre-empted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. [*Id.* at 504-05]

The *Malone* Court went on to conclude that rather than attempting to decipher the implications for federal pre-emption of Congress' silence in enacting the NLRA, the Court had available to it "a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans" in the Welfare and Pension Plans Disclosure Act, 72 Stat. 997, the applicable federal pension law at the time the case arose. 435 U.S. at 505. On the basis of the intent underlying that law, the Court sustained the state pension regulation at issue in *Malone*.[2]

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[2] Subsequently, in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, the Court concluded that the enactment of the Employee Retirement Income Security Act ("ERISA"), with its "express preemptive intent," 451 U.S. at 526 n.23, reflected a "federal policy to keep calculation of pension benefits a subject of either labor-management negotiations or federal legislation," *id.* at 526 n.22, and thus foreclosed further state regulation.

The same analysis is applicable here. The question posed by the Wisconsin rule at issue in this case is *not* whether the states may confer independent, state law rights on employers or employees—the Wisconsin cause of action for breach of the duty of good faith does not do so—but rather whether the states may regulate the employment relationship by regulating the legal obligation of the parties flowing from a particular provision of a collective bargaining agreement (in this case an insurance provision).[3] As we proceed to show, with respect to state regulation of this character, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides a "reliable indicium of congressional intent." And the lesson of § 301—especially when read in conjunction with the NLRA, *cf. Alessi v. Raybestos-Manhattan, Inc.*, *supra*—is clear: the states are *not* free to regulate in any respect the obligation of the parties that flow from entering into a collective bargaining agreement or the legal consequences that result from breaching such obligations. In enacting § 301, Congress "intended doctrines of federal labor law uniformly to prevail" on those matters, *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); Congress thus "occupied th[at] field and closed it to state regulation," *Auto Workers v. O'Brien*, 339 U.S. 454, 457 (1950).

B. We begin our analysis by examining the Wisconsin cause of action for breach of the duty of good faith. That cause of action originated in *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 235 N.W. 413 (1931), in which the Wisconsin Supreme Court held that an in-

[3] Thus, contrary to the suggestion that the Chamber of Commerce made in its *amicus* brief in support of the petition (at 9-10), the issue posed by this case is unlike the one that would be posed by a "tort cause of action for wrongful discharge." A wrongful discharge cause of action does not depend in any way on the terms of a collective bargaining agreement but rather imposes a duty on employers independent of their agreements. That is not true of the cause of action at issue here.

surer with the authority to settle or defend claims made against the insured by a third party owes a duty of good faith to the insured in adjusting such claims. The *Hilker* Court reasoned that this "duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract," 235 N.W. at 415, and was "a correlative duty growing out of certain rights and privileges which the contract confers upon the insurer," *id.* at 414; the duty thus could "be ascertained from a consideration of the contract itself," *id.* at 415.[4]

In *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978), the Wisconsin Supreme Court extended *Hilker* to apply to the insurer's processing of claims filed by the insured himself (rather than claims filed by a third party). The court explained the basis for that extension as follows:

> The rationale which recognizes an ancillary duty on an insurance company to exercise good faith in the settlement of third-party claims is equally applicable and of equal importance when the insured seeks payment of legitimate damages from his own insurance company. That such a duty arises out of the relationship between the contracting parties themselves cannot be doubted. As black letter law, Restatement, *Law of Contracts* 3d, sec. 231 (Tentative Drafts No. 1-7, Rev. and Edited, 1973), provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."
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[4] *See also Alt v. American Family Mutual Ins. Co.*, 71 Wis. 2d 340, 237 N.W.2d 706, 711 (1976) ("the duty of the insurer to exercise good faith . . . arises from provisions of the insurance contract); *Baker v. Northwestern Nat'l Gas Co.*, 22 Wis. 2d 77, 125 N.W.2d 370, 372 (1963) (duty of good faith is a "correlative duty on the part of the insurer").

As the California court in *Gruenberg* [*v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 108 Cal. R. 480, 486, 510 P.2d 1032, 1038 (1973)] stated:

> ". . . in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."

We conclude that the above statement is fully in accord with sec. 231, Restatement, *Law of Contracts* 2d (Tentative Drafts Nos. 1-7 Rev. and Edited, 1973), and we expressly adopt the *Gruenberg* statement as declaring the accepted law and applying the principle of law set forth by this court in *Hilker*. [271 N.W.2d at 375-76].

The *Anderson* court went on to hold that the cause of action for breach of the duty of good faith "sounds in tort although it arises out of a contractual relationship."[5]

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[5] The Wisconsin Supreme Court's entire explanation for treating the cause of action as a tort was as follows:

> By virtue of the relationship between the parties created by the contract, a special duty arises, the breach of which duty is a tort and is unrelated to contract damages. This tort of bad faith or malicious and intentional harassment by one party to a contract directed toward the other party, who seeks to assert his contract claim, has been referred to as a "tortious breach of contract." *Drake* [*v. Milwaukee Mutual Ins. Co.*, 70 Wis.2d 977, 983, 236 N.W.2d 204 (1975)]. While that term may be a convenient shorthand method of denominating the intentional conduct of a contracting party when it acts in bad faith to avoid its contract obligations, it is confusing and inappropriate, because it could lead one to believe that the wrong done is the breach of the contract. It obscures the fact that bad faith conduct by one party to a contract toward another is a tort separate and apart from a breach of contract *per se* and its fails to emphasize the fact that separate damages may be recovered for the tort and for the contract breach. [271 N.W. 2d at 374]

In *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981), the Wisconsin Supreme Court elaborated upon the rationale of *Hilker* and *Anderson*. In that case a third party, who was injured by the insured and who submitted a claim against the insured to the insurer, brought suit against the insurer for allegedly processing that claim in bad faith. The court rejected the asserted cause of action, explaining:

> The heart of the tort recognized in *Anderson* is the fiduciary relationship between the insurer and the insured and the insurer's breach of the duty of good faith and fair dealing implicit in every contract. Where a person contracts with an insurance company for coverage in case of particular losses, the insured has a right to expect to be treated fairly and to have legitimate claims paid promptly. . . .
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> The insured's right to be treated fairly (and his recourse to the courts if he is not) is rooted in the contract of insurance to which he and the insurer are parties. The third party has not contracted for insurance benefits and is not in a contractual relationship, much less a relationship of trust, with the insurer. [*Id.* at 261]

C. Because the Wisconsin duty of good faith is "rooted in the contract" and, as the Wisconsin Supreme Court reaffirmed in this case, is " 'imposed as a consequence of the relationship established by contract,' " Pet. App. 5, *quoting Anderson, supra*, 271 N.W.2d at 374[6]—and because the contract involved in this case is a collec-

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[6] *See also Davis v. Allstate Ins. Co.*, 101 Wis. 2d 1, 303 N.W.2d 596, 599 (1981); *Fehring v. Republic Ins. Co.*, —— Wis. ——, 347 N.W.2d 595, 600 (1984).

tive bargaining agreement "in an industry affecting commerce"—§ 301 is necessarily implicated.

Section 301 creates a federal cause of action "for violation of contracts between an employer and a labor organization. . . ." In the seminal case of *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455-56 (1957), the Court concluded that § 301 "expresses a federal policy that federal courts should enforce these agreements" and that "the substantive law to apply is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 455, 456. And in *Teamsters Local v. Lucas Flour Co., supra*, the Court held that "[t]he dimension of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute"—that "issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." 369 U.S. at 103. Subsequent cases make clear that the "preemptive force of § 301 is so powerful" that "a complaint that comes within the scope of the federal cause of action"—even though "pleaded [as] an adequate claim for relief under state law"—nonetheless is "purely a creature of federal law" and "necessarily 'arises under' federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, —— U.S. ——, 51 L.W. 4945, 4951 (June 24, 1983); *see also Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968).

In *Lucas Flour* and its progeny the state causes of action that were held to be pre-empted and to arise only under federal law were pure contract suits. Here, in contrast, what is involved is a cause of action for breach of a duty imposed by operation of state tort law "as a consequence of the relationship established by contract," p. 9, *supra*; according to the Wisconsin Supreme Court, "a breach of contract is not directly relevant to the determination of whether there was bad faith," Pet.

App. 10. But even assuming that this were an accurate characterization of the tort of bad faith,[7] the tort still would be preempted here, for as we proceed to show, in regulating the "consequence[s] of the relationship" established by a § 301 contract, Wisconsin has entered an "area covered by the statute" and has resolved "issue[s] raised in suits of a kind covered by § 301"—issues as to which, under *Lucas Flour*, "federal labor law must be paramount" and must "uniformly . . . prevail." 369 U.S. at 103, 104.

D. That respondent's bad faith claim could have been pleaded as a contract claim under § 301 cannot be denied. After all, the Wisconsin Supreme Court, in fashioning the duty of good faith, relied on the law of contracts—specifically on earlier drafts of what is now § 205 of the *Restatement (Second) of Contracts* under which "a duty of good faith and fair dealing" is to be read into every contract as a matter of contract law. *See* pp. 7-8, *supra*. Respondent thus could have alleged that petitioner owed him this implied duty under the collective bargaining agreement,[8] and respondent could have sued on the contract for breach of that (alleged) duty.[9]

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[7] As we show *infra* at 16-18, the decisions of the Wisconsin Supreme Court make clear that, in fact, a necessary element of the tort of bad faith is proof of a breach of contract and that the tort exists to provide extra-contractual damages for willful contract breaches.

[8] Indeed, in *Gruenberg v. Aetna Ins. Co., supra*, the California Supreme Court's seminal decision whose holding the Wisconsin Supreme Court in *Anderson* "expressly adopt[ed] . . . as declaring the accepted law," *see* p. 8, *supra*, the California Supreme Court held that an insurer's breach of the duty of good faith "sounds in both contract and tort." 510 P.2d at 1036.

[9] Of course, had respondent sought to imply a duty of good faith as a matter of federal contract law, respondent would have been required first to exhaust the grievance-arbitration procedure established by the collective bargaining agreement. *See* pp. 20-21 *infra*.

Indeed, it is quite common for one party to a collective bargaining agreement to claim a breach by the other party of a duty said to be implied under the agreement. In *Lucas Flour* itself, for example, the ultimate issue for decision was whether, notwithstanding the absence of a no-strike clause in the collective bargaining agreement, the union had an implied duty not to strike over issues which were arbitrable. And in *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979), the question presented was whether a duty "to use all reasonable means to prevent and end [wildcat] strikes . . . is either (a) implied in law because the agreement contains an arbitration provision or (b) in any event is to be implied from the promise of the agreement that the parties 'agree and affirm that they will maintain the integrity of the contract . . . .'" *Id.* at 216. *See also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-10 (1983) (discussing whether union officers had an "implicit" contractual duty to "take affirmative steps to end an unlawful work stoppage").

In these cases the Court decided whether or not to imply the particular duty being claimed as a matter of federal law under § 301; indeed, *Lucas Flour* squarely holds that federal law alone controls the decision of such issues. Where, as in *Lucas Flour*, it is determined as a matter of federal law that there is an implied duty under a collective bargaining agreement, federal law then goes on to decide, as federal questions, how that duty should be enforced and how breaches of the duty should be remedied. *Cf. Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176 (1942). Conversely, where, as in *Carbon Fuel*, it is determined as a matter of federal law that a particular duty should *not* be implied under the agreement, that is the end of the matter, and it plainly is not open to the states to imply that very same duty as a matter of state contract law. *Cf. Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32 (1964). In either

event federal law is determinative as to the existence *vel non* of the duty.

The result cannot be different merely because Wisconsin conceives of the duty of good faith as a tort-law duty imposed "as a consequence of the relationship established by contract," p. 9, *supra*, rather than as an implied-in-law contractual duty. "The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make" *Prosser & Keeton on the Law of Torts* 655 (5th ed. 1984); in both contract and tort law certain "obligations of conduct are imposed by reason of the relation in which the parties stand toward one another," *id.* at 5. Moreover, viewed from the perspective of the parties to the contractual relationship, there is little difference between a tort-law duty imposed "as a consequence" of the relationship, and a contract duty "implied in law" from the contract: the end result in either event is that, by entering into an agreement, one party (in this case petitioner) owes a legally-enforceable duty to the other (in this case a duty of good faith) that the party did not voluntarily agree to assume, but that the law believes should be imposed nonetheless.

Given that reality, it would make no sense to conclude that the pre-emptive force of § 301 depends upon "'mere labels' of state law," *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)—that is, upon whether a state acts through the rubric of its contract or its tort law. Such a conclusion would draw things too fine, ignoring the fact that, in a context like the present, rules that the state denominates as tort law and rules that are denominated as contract law serve a unitary function: defining the legal consequences of particular relationships that parties voluntarily create. And in the context of the instant case, to conclude that § 301 pre-empts only state contract law would produce the untenable result that the state would be precluded from creating and enforcing a

duty of good faith as a matter of *contract*, but could create and enforce that very same duty as a matter of state *tort* law.

The proper conclusion, then, is this: in enacting § 301, Congress provided that federal law—and federal law alone—would determine both the duties that are imposed on the parties to a particular collective bargaining agreement as a result of entering into that agreement, and also the consequences to the parties of a breach of any of those duties. In this Court's words, Congress intended that federal law would "*defin*[*e*] *the relationships created by such an agreement*" by "apply[ing] an evolving federal comon law grounded in national labor policy," *Bowen v. Postal Service*, 459 U.S. 212, 224-25 (1983) (emphasis added). That is "the area covered by the statute," *Lucas Flour*, *supra*, 369 U.S. at 103, and as to that area "federal labor law must be paramount," *id.*

Indeed, to permit state law to impose duties on a party to a collective bargaining agreement as a consequence of that agreement so long as such duties are denominated tort-law duties would run directly contrary to the logic of § 301 as stated in *Lucas Flour*. In that case the Court based its conclusion that federal law was pre-emptive under § 301 principally on the ground that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'" 369 U.S. at 103. The Court explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes. [*Id.* at 103-04; citation omitted]

Although *Lucas Flour* speaks in terms of the dangers that would arise from permitting a particular contract term to have "different meanings" or be subject to "conflicting substantive interpretation under competing legal systems," the Court's concern, quite obviously, was not with "meaning" as an abstract matter but with the legal consequences that could flow from giving a contract term differing interpretations under differing legal systems. And that concern would be equally implicated if, by operation of state tort law, a particular contract term could yield differing legal duties under competing legal system.

If, for example, as a consequence of agreeing to an insurance program an employer could be held to a duty to investigate all benefit claims under one state's law, a duty to pay promptly under another state's law, and a duty to notify claimants of the disposition of their claims under a third state's law, "the process of negotiating an agreement would be made immeasurably more difficult," and, if an agreement were reached, such a regime "would tend to stimulate and prolong disputes." *Lucas Flour*, *supra*, 396 U.S. at 103-04. Thus, to exclude state tort claims that arise "as a consequence" of a collective bargaining agreement "from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith v. Evening News Co.*, 371 U.S. 195, 200 (1962).

In sum, regardless of the rubric under which state law is invoked to regulate the consequences of entering into a collective bargaining agreement, the rule under § 301 is clear: federal law is the exclusive source of law for determining and enforcing the duties of the parties that flow from such a contract. And under that rule the cause of action at issue here is pre-empted.

E. There is a second and independent reason why the instant cause of action is pre-empted. Our analysis thus far has proceeded on the premise that the Wisconsin tort of bad faith, while resting on a duty that arises "as a consequence" of the contract, nonetheless is a wrong independent of any contract breach; we have shown that even on that premise, the tort is pre-empted here because of its attempt to regulate the legal consequences to the parties of signing a § 301 contract. But as we now show, the decisions of the Wisconsin Supreme Court establish that, in fact, a breach of contract is a necessary element of a bad faith claim, and that that tort theory is, at bottom, simply a rule affording extraordinary damages for particular types of contract breaches. Given that reality, respondent's claim would be pre-empted even if, contrary to our prior showing, § 301 did not preclude the states from imposing and enforcing legal duties as a consequence of collective agreements. For in all events, § 301 surely does preclude the states from using state law to provide special, state-law remedies for breaches of § 301 contracts.

The elements of the tort of bad faith were set forth by the Wisconsin Supreme Court in *Anderson*, *supra*:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. [271 N.W.2d at 376]

That court elaborated on these elements as follows:

> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, *i.e.* would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.
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> Under these tests of the tort of bad faith, an insurance company . . . may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis. [*Id.* at 377]

In two subsequent cases, including one decided several months after the decision in the instant case, the Wisconsin Supreme Court reaffirmed *Anderson*'s holding as to the elements of the tort. *Davis v. Allstate Ins. Co.*, *supra*, 303 N.W.2d at 599; *Fehring v. Republic Ins. Co.*, *supra*, 347 N.W.2d at 600.

Given these elements there can be no doubt that in operative terms the Wisconsin tort of bad faith is the means by which the Wisconsin courts provide extra-contractual damages for a willful breach of an insurance contract (including punitive damages and compensation for mental suffering, *see Anderson*, *supra*, 271 N.W.2d at 378-79). As *Anderson* and its progeny make clear, the gravamen of the bad faith action is proof of "the absence of a reasonable basis for denial of policy benefits," *Anderson*, *supra*, 271 N.W. 2d at 377; "when a claim is 'fairly debatable,' the insurer is entitled to debate it," *id.* at 376. The tort of bad faith thus provides tort-law damages for "unreasonable" (*i.e.* willful) breaches of insurance contracts.

The Wisconsin Supreme Court argued otherwise in the instant case, maintaining that " 'the tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong which results from a breach of duty imposed as a consequence of the relationship established by

contract.'" Pet. App. at 5, *quoting Anderson, supra,* 271 N.W.2d at 374. But as the decision below itself states—and as *Anderson* and its progeny make clear—the "duty" that Wisconsin has imposed on the insurer "as a consequence" of the contract is simply a duty to "pay those claims that are "reasonably indisputable" *under* the contract, Pet. App. at 5—which is to say a duty not to unreasonably (or willfully) breach the insurance contract.

The example the Wisconsin Supreme Court offered in its attempt to disassociate the tort from the contract breach actually proves the interrelationship of the two. The court stated:

> [A] bad faith action could be maintained even if no breach of insurance contract occurred. For example, an insurer could ultimately pay a claim and thereby meet the terms of the insurance contract, but still have caused injury to its insured by unreasonably delaying payment of a legitimate and undisputable claim. In fact, it would appear that this set of events is what [respondent] alleges occurred .... [Pet. App. at 14]

But if, under the collective bargaining agreement, respondent were not eligible for the disability benefits he claimed, or if petitioner were entitled to delay payment for the period for which payment was withheld, then, by definition, petitioner would not have "unreasonably delay[ed] payment of a legitimate and undisputable claim." Thus, to prove bad faith in the court's example, respondent would have to establish his entitlement to the benefits as of the time he was denied them—which is to say respondent would have to prove that petitioner breached its collective bargaining agreement by delaying payment. And if respondent so proved—and further proved the absence of a "reasonable basis" for the delay—the tort of bad faith would provide him with a remedy for this willful breach.

Once it is recognized that the Wisconsin tort of bad faith is merely a rule of extraordinary damages for willful breaches of insurance contracts, it follows that § 301 pre-empts the state law insofar as it applies to collectively-bargained insurance contracts. For under § 301 it is most assuredly for federal law to determine the remedies available for a breach of a collective bargaining agreement as part of the process of "fashion[ing] a body of federal law for the enforcement of these collective bargaining agreement." *Textile Workers v. Lincoln Mills, supra,* 353 U.S. at 451. Whenever a federal law creates a right and a cause of action, the remedies for breach of that right, "though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be deprived from the statute and the federal policy which it has adopted." *Sola Electric Co. v. Jefferson Co., supra,* 317 U.S. at 176. And one reason that federal law has been held pre-emptive in a variety of contexts is precisely to avoid "potential conflict . . . of remedy." *San Diego Unions v. Garmon, supra,* 359 U.S. at 242. *See also Teamsters Union v. Morton,* 377 U.S. 252, 260-61 (1964) (precluding award of punitive damages under state law for secondary boycott activity).

Fashioning a federal law of remedies for breaches of collective bargaining agreements has been one of the principal subjects of this Court's decisions under § 301 for over twenty-five years. In *Lincoln Mills* itself the question for decision was whether the remedy of specific performance was available for breach of a collectively-bargained promise to submit contractual disputes to arbitration. And subsequent to *Lincoln Mills* the Court has addressed several times the availability of damages for breaches of no-strike clauses. *See Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962); *Complete Auto Transit Inc. v. Reis,* 451 U.S. 401 (1981).[10] Thus

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[10] *See also Drake Bakeries v. Bakery Workers,* 370 U.S. 254 (1962); *Lewis v. Benedict Coal Corp.,* 361 U.S. 459 (1960).

remedying contract breaches is necessarily within "the area covered by § 301," *Lucas Flour*, *supra*, 369 U.S. at 103, and therefore § 301 leaves no room for the states to apply their own rules of remediation to breaches of collective bargaining agreements.

Furthermore, permitting state law to determine what remedies are available for a breach of a collective bargaining agreement would pose all of the dangers which *Lucas Flour* teaches § 301 was intended to avoid. If differing remedies were available for a breach of a collective agreement under differing legal systems, "the process of negotiating [such] an agreement would be made immeasurably more difficult" and such a regime "would tend to stimulate and prolong" any disputes which thereafter arose. 369 U.S. at 103-04. Thus, this Court's conclusion in *Lucas Flour* that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law,'" *id.* at 103, applies with full force to the subject of remedies for contract breaches.

F. There remains a question as to the appropriate disposition of this case. Respondent's complaint in terms alleged only a state-law claim of bad faith; so viewed, the complaint must be dismissed as pre-empted for the reasons just set forth.

Under *Avco Corp. v. Aero Lodge 735*, *supra*, however, the complaint in this case could be deemed to allege a federal claim arising under § 301 even though it is not so pleaded. But so viewed, dismissal still would be the appropriate disposition for the "federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel v. Maddox*, 379 U.S. 650, 652 (1965). Exhaustion is required because "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the

'common law' of the plant." *Id.* at 653, citing LMRA § 203(d), 29 U.S.C. § 173(d). And the fact that under Wisconsin law respondent would not be required to exhaust his contractual remedies before asserting his bad faith claim only magnifies the conflict with federal law and provides added reason for concluding that the state cause of action is pre-empted.

In sum, viewed as alleging a state-law claim, respondent's complaint should be dismissed as pre-empted; viewed as alleging a § 301 claim, the complaint should be dismissed for failure to exhaust contractual remedies.[11]

---

[11] Because federal law, if applicable, would require dismissal of respondent's complaint in order to protect the federal policy favoring arbitration of labor disputes, the Wisconsin Supreme Court's decision rejecting the applicability of federal law is a final judgment within the meaning of 28 U.S.C. § 1257(2). *See Southland Corp. v. Keating*, —— U.S. ——, 52 L.W. 4131 (Jan. 23, 1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). Also because, under federal law, respondent's claim must be submitted to an arbitrator for decision, there is no occasion in this case for the Court to decide whether, as a matter of federal law, a duty of good faith is properly implied from an insurance provision of a collective bargaining agreement of if so, whether, as a matter of federal law, tort-law remedies, including punitive damages, would be available for a breach of such a duty. We would note only that on the first of these questions, *Carbon Fuel* points against freely implying duties from collective agreements, and on the second question, the thrust of federal labor law runs against punitive damage awards, *cf. Labor Board v. Republic Steel*, 311 U.S. 7 (1940); *Teamsters Union v. Morton*, *supra*, 377 U.S. at 260-61; *Electrical Workers v. Foust*, 442 U.S. 42 (1979). *See also United Shoe Workers Local 127 v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962) (en banc).

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be reversed.

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AMICUS CURIAE

BRIEF

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IN THE

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October Term, 1983

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Petitioner,

v.

RODERICK S. LUECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF AMICI CURIAE OF THE STATES OF WISCONSIN AND HAWAII IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The States of Wisconsin and Hawaii are two of the fifty sovereign states.

Their interest in this case is to preserve the common law rights of their citizens against a claim of federal preemption.

The amici support the position of the respondent.

SUMMARY OF ARGUMENT

This case sounds in tort. It is not an action ex contractu within the exclusive remedial scheme of 29 U.S.C. § 185(a). Respondent's rights do not turn on a meaning or interpretation to be placed on a contract. They turn on common law tort rules imposing fiduciary obligations on insurers of disability pay claims. Those very rules presuppose an undisputed contract claim. The contract claim here is not disputed. The fact that the employer's tort duty arises from the existence of a

contractual relationship does not convert the tort claim into a contract claim.

The employe's claim, for the tortious breach of an insurer's fiduciary obligation as to an undisputed contract claim, is not preempted under San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), and its progeny. The fact, if it is a fact, that the employer's conduct also violated the collective bargaining agreement does not, by itself, make the conduct an arguable unfair labor practice within Garmon. Nor do any other facts suggest the employer's conduct constituted an unfair labor practice in respect to its duty under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. (1976), to deal exclusively with a union. The facts

suggest only that the employer tortiously abused an employe.

What is more, there is no NLRA preemption even if the same factual setting might have provoked an unfair labor practice claim. The respective controversies before the National Labor Relations Board and the Wisconsin courts would not be the same. The Board would deal with the employer's duty to deal exclusively with the union in resolving disputes. The Wisconsin courts would deal with the employer's duty as an insurance fiduciary towards an employe respecting an undisputed claim. The federal interest, moreover, in controlling the dispute resolution relationship between employer and union is peripheral to the state's interest in requiring a good faith disposition of undisputed matters involving individual

employes. The state's interest is deeply rooted in local feeling and responsibility. Its rule is of general application and is neutral to the bargaining relationship of employers and unions. State exercise of this control does not disserve the federal interest in uniformity of regulation as between employers and unions.

ARGUMENT

I. This Case Sounds In Tort, Not Contract

Petitioner employer, in its capacity as insurer of employe disability pay claims, contends that the Wisconsin Supreme Court placed a state tort label on what in fact is a contract dispute covered by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1976), and therefore is

subject to the exclusive remedies of the collective bargaining agreement. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). The respondent employe and the amici contend that this case sounds in tort, not contract.

Section 301 of the LMRA relates to "[s]uits for violation of contracts between an employer and a labor organization... ." 29 U.S.C. § 185(a). One can concede that section 301 and the exclusive arbitral remedies apply if a case turns on contract interpretation, so long as the obligation sought to be enforced has its source in the contract, Wilkes-Barre Pub. Co. v. Newspaper Guild, 647 F.2d 372, 380 (3rd Cir. 1981), cert. denied, 454 U.S. 1143 (1982); cf. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); and Steelworkers v. Enterprise

Wheel & Car Corp., 363 U.S. 593, 596 (1960), without agreeing this is such a case.

This case does not turn on contract interpretation. The employe never alleged that, by not paying the disability claim due him, the employer had violated a term of the labor agreement. The employer never has defended its failure to pay by citing a term of the labor agreement. There was no dispute as to the meaning or the interpretation of the collective bargaining agreement.

Nor does the obligation the employe seeks to enforce have its source in the collective bargaining agreement. The source of the obligation is Wisconsin's common law, which imposes a duty of good faith on an insurer in treating a disability pay claim. That duty is

fiduciary, and is triggered only when the claim is undisputed. Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 565, 342 N.W.2d 699, 702 (1984). The employe's claim is independent of any entitlement under the contract and is one "arising out of the manner in which his disability claim was handled." Id. As alleged, the employer repeatedly withheld disability benefits with knowledge there was no reasonable basis for doing so. (Compl. para. 10.)

The Wisconsin Supreme Court was careful to isolate the question of entitlement under the contract from the fiduciary obligation to treat the claim in good faith. A contract violation, "if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim."

Lueck, 116 Wis. 2d at 566, 342 N.W.2d at 703. The jury was to be instructed that "it is to consider only the bad faith claim, not any alleged breach of contract claim." Lueck, 116 Wis. 2d at 575, 342 N.W.2d at 707 n. 10. The state court, therefore, closely tracked Farmer v. Carpenters, 430 U.S. 290, 305 (1977), where this Court recognized the viability of state tort claims related to the "particularly abusive manner" in which the otherwise preempted conduct occurred.

The decision below followed a clear tradition of insulating the merits of a contract claim from the tortious breach of a fiduciary duty in respect to an undisputed contract claim. In Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368, 376 (1978), the Wisconsin court held that the tort

action would not lie if the contract claim was "fairly debatable." It was an intentional tort that required a plaintiff to show the "absence of a reasonable basis for denying the benefits ... ." Id. The insurer is liable only if it "intentionally denied ... a claim without a reasonable basis." Id., 271 N.W.2d at 377.

The employer-insurer argues that this is a sec. 301 contract case because its fiduciary obligation originates in the existence of a contractual relationship. But § 301 on its face relates to alleged "violations" of the contract, not its existence. The fact that the tort duty arises from the existence of a contractual relationship does not convert the tort action into one ex contractu. Numerous tort duties exist only because a contractual

relationship exists. Among them are a common carrier's duty to its passengers, attorney-client, physician-patient, safe-place statutes, etc. See Prosser and Keeton, Law of Torts, 383, 660-61 (5th Ed. 1984).

In the employment relationship, the common law has superimposed various tort duties onto the contractual relationship. Although as a general matter no duty is owed to protect a person from harm, a "special relationsip" always has existed between master and servant, vesting the servant with the right to sue the employer for failure to discharge a duty of protection. See Restatement (Second) of Torts § 314, 314B (1965). Perhaps the most instructive example of traditional state remedies arising from the fact of a contractual relationship, but not

themselves contractual rights, are the worker's compensation statutes. Even if a labor agreement provided benefits for job-related injuries, never has it been suggested that § 301 ousts states of the right to provide worker's compensation benefits for those same injuries.

The fiduciary obligation of an insurer to fairly treat the insured similarly has been a traditional state prerogative to impose on employers. Indeed, this Court has held that a state power in this area extends to making modifications of terms established in collective bargaining agreements, absent congressional action. See Malone v. White Motor Corp., 435 U.S. 497, 505 (1978).

Consequently, the suggestion by the amicus AFL-CIO, that § 301 preempts because Wisconsin is regulating the consequences of a contractual relationship, fails to acknowledge that numerous tort obligations arise only because there is a contractual relationship. And that amicus falters when maintaining that wrongful discharge actions are not § 301 cases because they turn on duties independent of the contract, not terms of the contract. Br. at p. 6 n. 3. One need not decide whether a wrongful discharge action is within § 301 to recognize that this action turns only on the fact of a contractual relationship, not a dispute as to the terms of the contract.

Nor does the amicus AFL-CIO successfully convert this tort action into a contract action by noting that

Wisconsin's rule requires a determination that there is no reasonable dispute as to the meaning of the contract. It is that requirement that assures against state intrusion into debatable contractual matters controlled by § 301.

Accordingly, the fact that the employe's Wisconsin common law rights arise from the fact of a contractual relationship with an employer does not make the common law obligation a contractual obligation within § 301.

II. This Action Is Not Preempted Under Garmon

If this is not a § 301 contract case, as the employe and the amicus contend, then the Garmon analysis comes into play. San Diego Building Trades Council v. Garmon, 359 U.S. 236

(1959). For Garmon applies if a case falls outside jurisdiction under § 301. If the case falls under § 301, Garmon becomes irrelevant to the exercise of a state court's concurrent jurisdiction with the NLRB over the conduct, even to the point that a state court can adjudicate an unfair labor practice that otherwise would be within the exclusive jurisdiction of the NLRB. See William E. Arnold Co. v. Carpenters, 417 U.S. 12, 16 (1974); Vaca v. Sipes, 386 U.S. 171, 187-88 (1967); Smith v. Evening News Asso., 371 U.S. 195, 197 (1962). But since Wisconsin does not proceed under § 301, its jurisdiction over this tort must stand the test of Garmon, which is that state jurisdiction is preempted as to conduct which arguably is protected under

section 7 or prohibited as an unfair labor practice under section 8 of the NLRA.

The petitioner and supporting amicus now disclaim the relevance of a Garmon analysis. They suggest the Wisconsin Supreme Court was confused in reviewing this case under Garmon standards. In fact, however, it was the employer who implored the Wisconsin Supreme Court to employ a Garmon analysis. Moreover, since Wisconsin does not purport to proceed under § 301, Garmon becomes relevant. Therefore, the Wisconsin Supreme Court appropriately examined Garmon, and the correctness of its examination should be noted even though the employer now abandons the argument.

Obviously, this case does not fall within Garmon preemption simply because

the alleged conduct may be remediable in arbitration as a contract violation and that such a violation may arguably constitute the unfair labor practice of refusing to bargain in good faith. For a contract violation is not ipso fact an unfair labor practice. International U., U.M.W. of A. v. NLRB, 257 F.2d 211, 241-15 (D.C. Cir. 1958). To convert a contract violation into the unfair labor practice of refusing to bargain in good faith, the employer must have repudiated its duty to deal with the union in respect to wages, hours, or conditions of employment. Cf. NLRB v. Local 103, Ironworkers, 434 U.S. 335 (1978). Thus, an employer's unilateral changes in the terms of employment will constitute a refusal to bargain in good faith if the conduct is "tantamount to an outright

refusal to" deal with the union. NLRB v. Katz, 369 U.S. 736, 743, 746 (1962).

This record does not show an employer refusal to deal in good faith with a union, and the Wisconsin court did not purport to regulate that relationship. Rather, Wisconsin applied its common law to protect an individual from the bad faith manner of handling of his claim for disability pay benefits.

It is evident, then, that this case falls within the exception to Garmon recognized in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978). For even if "the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same." Id. at 196-97. The Board would deal with the employer's relationship

with the union, any union request to negotiate with the employer, and the employer's response thereto. The Wisconsin forum deals with the good faith, or lack thereof, in responding to the employe's undisputed claim. In Sears, this Court held state regulation of the locus of picketing did not interfere with the Board's jurisdiction over the legitimacy of the objective of the picketing. California could permit the locus while the Board enjoined the objective, or the Board could approve the objective while California enjoined the place. The issues between the two forums there were not less disparate than the two here.

Similar to the Sears exception to Garmon is the rule that states may act on matters of only peripheral concern to the NLRA. See Farmer v. Carpenters, 430

U.S. 290, 296-97 (1977). States are not ousted of jurisdiction when dealing with only "a minor aspect" of a matter within the regulatory jurisdiction of the Board. Sears, 436 U.S. at 189 n. 13. The manner of responding to an individual's claim for disability pay is peripheral, at best, to the interests of the NLRA. The heart of the NLRA's duty to bargain in good faith is that the employer must deal with the union exclusively, not the individual, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 484-85 (1960), and must make a good faith effort to arrive at an agreement with the union. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). The manner of responding to an undisputed claim is peripheral at best to the federal

interest of inducing employers to strive earnestly to reach agreement on disputed matters with unions.

Additionally, Garmon itself recognized the need for an express congressional intent of preemption as to matters "deeply rooted in local feeling and responsibility." Garmon, 359 U.S. at 244. The relationship between insurers and insureds is such a matter. There is a long history of congressional recognition that the proper relationship between insurers and the insureds belongs to the state. See 15 U.S.C. §§ 1011, 1012 (1976). It was not until the narrow exception of the Employe's Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. that any exception has been made. See Malone v. White Corp., 435 U.S. 497 (1978). And, despite ERISA, state jurisdiction

remains intact as to compliance with disability insurance laws. Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2905 (1983).

Moreover, this Court has been inhospitable to claims of Garmon preemption where the state law reflects a policy that is even-handed and neutral to collective bargaining as such, despite consequent impacts on the relative strength of the bargaining relationship. Compare New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979), and Ohio v. Hodory, 431 U.S. 471 (1977). While facially neutral state laws are not automatically exempt from Garmon, see Farmer v. Carpenters, 430 U.S. 290, 300 (1977), they shift to the challenger the burden of showing both that identical conduct is regulated and that the exercise of state

jurisdiction would disserve the federal interest in the uniformity of NLRB regulation. Sears, 436 U.S. at [illegible].

Wisconsin's law of the fiduciary obligation of an insurer toward insureds is one of general application and is neutral to the employer-union relationship. As seen, regulating the good faith of a response to an undisputed insurance claim is far from regulating the duty of an employer to seek in good faith to resolve disputed claims with unions. No federal interest in uniformity is disserved by such a general law when applied to benefit employes victimized by the intentional disregard of their undisputed rights.

Finally, the states historically have operated in the labor relations field side-by-side with the Congress without encroaching federal interests.

Perhaps the most famous of these is worker's compensation laws, which form a matrix of the contractual relationship between employer and employe, whether union or nonunion. Without question, they impose a cost on the employer and give the employe a right against the employer respecting conditions of employment. Moreover, no one could doubt that the benefits for workers established by state law might be made a mandatory subject of bargaining. What has evolved is a federal collective bargaining relationship that builds on the foundational relationship illustrated by worker's compensation statutes.

The analogue to the state's interest in its worker's compensation law is particularly cogent here. Subsequent to the decision under review,

the Wisconsin Legislature subjected claims such as this employe's to the exclusive remedies of the worker's compensation law, thereby removing the availability of the common law tort remedy. See Jadofsky v. Iowa Kemper Ins. Co., 120 Wis. 2d 494, 355 N.W.2d 550 (Ct. App. 1984).

It is submitted that a state-imposed duty, whether in tort or in worker's compensation, to deal in good faith with undisputed disability pay claims is part of the foundation of the relationship between employes and the insurers of their employers' obligations within traditional state prerogatives, not an intrusion into the dispute resolution machinery between unions and employers established by Congress.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

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On Writ Of Certiorari To
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STATEMENT OF THE CASE

Respondent succeeded in the Wisconsin Supreme Court in overturning a dismissal of his claim; a dismissal based upon summary judgment filed by Petitioner. Since summary proceedings were the only matters addressed throughout this case, Respondent's version of the ultimate facts of his claim were never presented. The only assertion of his claim rests in the allegations of his complaint which were generally denied by Petitioner (Pet. Cert. App. 28-30).[1]

The Respondent therefore requests this Court's indulgence in considering the following alleged facts only as they relate to the allegations of Respondent's complaint (J.A. 2-4). Additional alleged facts submitted after Respondent's commencement of the action also have value insofar as they show the same type of conduct by Petitioner as originally alleged by Respondent.

On February 24, 1975, the Respondent, RODERICK S. LUECK, (hereinafter "Lueck") began working for the Petitioner ALLIS-CHALMERS CORPORATION (hereinafter "A-C"). As a part of the consideration for his employment, Lueck was insured under a disability policy maintained and administered by AETNA LIFE & CASUALTY COMPANY (hereinafter "Aetna"), which among other things, insured Lueck against disability for non-occupational injury (J.A. 31-42). Lueck was so insured at the time of his non-work related injury on Sunday, July 19, 1981, when he injured his back while carrying a pig to a pig roaster at a friend's home.

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[1] Hereinafter the Petition for Certiorari is designated as "Pet. Cert."; the printed Joint Appendix is designated as "J.A.".

On Monday, July 20, 1981, Lueck notified A-C of his injury and subsequently reported to Waukesha Memorial Hospital where he was treated by a Doctor Haupt on July 24, 1981. Doctor Haupt excused Lueck from work for three (3) days and referred Lueck to Doctor Bolger, an orthopedic specialist. On July 27, 1981, Lueck filed a disability claim with Aetna and, based on Bolger's reports, commenced receiving disability benefits.

On August 13, 1981, Lueck received a notice from Aetna for a medical exam with general practitioner, Doctor Donald Ackermann, who confirmed Lueck's indefinite disability based on his examination on August 17, 1981.

On October 16, 1981, Lueck received another notice from Aetna for a medical exam with orthopedic specialist, Doctor Bragg, who again confirmed Lueck's disability based on his examination on October 22, 1981. Doctor Bragg's medical report on Lueck dated October 26, 1981, was received by A-C's company doctor, E. E. Gresch, on November 10, 1981. Based on the review of Doctor Bragg's report, Doctor Gresch extended Lueck's disability to November 30, 1981. In spite of this extended disability date by A-C's own doctor, A-C sent a notice to Lueck for yet another physical exam; this time with Doctor Gresch. Even though Lueck's benefits were to continue to November 30, 1981, his benefits were cut off on November 20, 1981, when he failed to appear for his appointment with Gresch on the same date. Lueck did, however, see Gresch on December 1, 1981, with Gresch continuing his disability to January 6, 1982.

On December 8, 1981, Lueck was involved in a serious automobile accident which required hospitalization. On December 11, 1981, as a result of this accident, for some unknown and unsubstantiated reason, A-C and Aetna

discontinued Lueck's disability benefits. These benefits remained discontinued until December 28, 1981, when, for yet another unknown reason, they were unilaterally reinstated by Aetna. Further, disability payments from December 28, 1981, to January 15, 1982, were discontinued until January 29, 1982, the day Aetna was served with the papers for the present action. Again, no reason for this delay in payments was ever advanced.

The reasons for delay are even more unclear when it is noted that Doctor Bolger continued Lueck's disability to February 10, 1982, following his examination of Lueck on January 8, 1982.

Further questions on A-C's and Aetna's good faith were raised when on January 12, 1982, A-C sent notice to Lueck to appear before a fourth (4th) doctor, Doctor Shapiro, on January 15, 1982. Shapiro is regularly hired by insurance companies and is known to deliver very sparse disability findings on a regular basis. It should be noted that Lueck's disability benefits had already been denied before the request to see Doctor Shapiro was made.

Lueck failed to see Doctor Shapiro and his disability benefits continued to be disallowed. On January 18, 1982, Lueck commenced his action against A-C and Aetna alleging bad faith in respect to the handling of his disability benefits (J.A. 1). Lueck further subpoenaed representatives of both A-C and Aetna for immediate deposition concerning the matter. On January 19, 1982, Lueck received a letter from A-C regarding the continued disallowance of benefits, further stating that termination from employment would occur if Lueck failed to contact A-C.

On January 20, 1982, Aetna was served with process. On January 21, 1982, A-C was served with process, with a

subpoena for deposition being directly served on A. J. ABPLANALP, A-C's supervisor of employee relations. MR. ABPLANALP terminated Lueck on February 2, 1982, the date of MR. ABPLANALP's deposition.[2]

On February 10, 1982, A-C filed its answer to Lueck's complaint, with Aetna doing likewise on February 12, 1982 (J.A. 1).

On February 23 and 26, 1982, A-C and Aetna respectively filed motions for summary judgment. Briefs by all parties were submitted (J.A. 1). On March 29, 1982, the Honorable Leah M. Lampone heard the oral arguments of the parties and subsequently granted summary judgment in favor of A-C and Aetna, dismissing Lueck's complaint exclusively on the following grounds:

1. The Appellant's cause of action falls under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.
2. That even if Appellant's cause of action were deemed to arise under state law instead of Section 301 of the Management Relations Act, 29 U.S.C. § 185, it would nevertheless be preempted by federal labor law. (Pet. Cert. App. 26-27.)

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[2] It should be noted, that, as a result of his February 2, 1982, termination, Lueck did file a grievance with his union for reinstatement. Pursuant to union contract procedures, Lueck's grievance was heard and he was reinstated on March 15, 1982. The more interesting note is that Lueck's disability benefits were also reinstated to March 12, 1982, the date that Lueck's own physician stated that he would be able to return to work. Such reinstatement of disability benefits was accomplished unilaterally by the employer without use of any of the procedures Petitioner claims was required under the union contract. Since those benefits have subsequently been received, exhaustion of remedies under the contract was apparently undertaken by A-C which, for all intents and purposes, may leave the issue of exhaustion of remedies moot.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court majority clearly recognized the existence of a national labor policy and rendered a decision based upon state law that was compatible with such policy. The majority recognized that, had Lueck's claim concerned the terms and conditions of employment as they are set out in the collective bargaining agreement, Section 301 would have clear application and thus prevent further state action.

However, Lueck's claim is premised not on an artful drafting of a complaint. His claim rests on tort that arises not from rights determined in the collective bargaining agreement but upon rights arising from Wisconsin common and case law.

As such, Lueck does not circumvent the terms and procedures of the collective bargaining agreement. Those terms and procedures are readily available to him should he seek disability benefits, which were wrongfully withheld. Likewise, those terms and procedures are unaffected by his commencing an action alleging tort based upon the outrageous and reckless manner in which he was treated. Section 301, "violation of contract" issues remain unaffected.

The majority lends further consistency to the national federal policy of allowing the states to regulate the "business of insurance" unless Congress specifically legislates otherwise. A-C's relationship with Lueck was one of insured and insurer, and the majority recognized this relationship as one that the state was free to regulate. The majority decision provides a means to reconcile potential conflict between not only national labor policy and state rights but also between national labor policy and other federal policies.

The majority further recognized potential conflict with the *Garmon* doctrine and responded accordingly. The majority recognized Wisconsin's overriding state interest in allowing Lueck's claim, and noted the exceptions to *Garmon* in clearly distinguishing Lueck's state tort cause from that of a Section 301 contract cause, thereby indicating the peripheral nature of Lueck's interests. These interests were deeply rooted in local feelings and responsibility and not in the collective bargaining agreement.

Consequently, the majority promotes industrial peace by giving to the Wagner Act that which is Wagner's and giving to the State that which is the State's.

ARGUMENT

I. THE WISCONSIN SUPREME COURT MAJORITY RULING IS COMPATIBLE WITH NATIONAL LABOR LAW POLICY.

A. The Majority Leaves Section 301 Principles Unscathed.

Section 301 of the Labor Management Relations Act relates to "(s)uits for violation of contracts between an employer and labor organization . . .", 29 U.S.C. § 185(a). Petitioner and supporting *amici* allege that Respondent's cause of action for bad faith is grounded upon a collective bargaining agreement and, as such, is subject to Section 301. See *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

Respondent however is not suing for a "violation of contract." His suit sounds in tort, not assumpsit. Respondent seeks redress not for *what* Petitioner did but rather upon *how* Petitioner did it. Petitioner is sued not for its breach of contract, but rather for the manner in which Petitioner breached the contract, i.e. intentionally and contemptuously (J.A. 4). Respondent's state action indicates that a breach of contract is not the issue. He

alleges that he was repeatedly denied disability insurance benefits without a reasonable basis and that Petitioner knew or recklessly disregarded the lack of a reasonable basis for continually denying the same (J.A. 4). See *Anderson* v. *Continental Insurance Company*, 85 Wis.2d 675, 691 (1978).

Respondent is addressing the particularly abusive manner in which he was treated. His claim arises from common law and sounds in tort and not contract. Wisconsin Supreme Court recognized the distinction in *Anderson, supra:*

> This tort of bad faith or malicious and intentional harassment by one party to a contract directed toward the other party, who seeks to assert his contract claim, has been referred to as a "tortious breach of contract." . . . While that term may be a convenient shorthand method of denominating the intentional conduct of a contracting party when it acts in bad faith to avoid contract obligations, it is confusing and inappropriate, because it could lead one to believe that the wrong done is the breach of the contract. It obscures the fact that bad faith conduct by one party to a contract toward another is a tort separate and apart from a breach of contract *per se* and it fails to emphasize the fact that separate damages may be recovered for the tort and for the contract breach. (85 Wis.2d at 686.)

The *Anderson* Court further clarified Respondent's position stating:

> We emphasize at this juncture only that the tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract. This rationale had its origin in an opinion of this court. *Hilker* v. *West-*

> *ern Automobile Ins. Co.*, 204 Wis. 1 231 N.W. 275, 235 N.W. 413 (1930, 1932). (85 Wis.2d at 687.)

Also see *Kranzush* v. *Badger State Mutual Casualty Company*, 103 Wis.2d 56 (1981) at pages 62-63.

The separate identity of Respondent's claim was reiterated in *Coleman* v. *American Universal Insurance Company*, 86 Wis.2d 615 (1979). Therein, the plaintiff, injured during the course of his employment and insured under the Workmen's Compensation Act, filed a complaint in circuit court against the workmen's compensation insurer alleging bad faith in the insurer's handling of the Plaintiff's worker's compensation claim. The Defendants answered the complaint denying the allegations and moved for summary judgment on the ground that the Plaintiff's exclusive remedy was under the Workmen's Compensation Act and that, accordingly, the courts had no jurisdiction to entertain this action.

The Wisconsin Supreme Court responded to the Defendant's motion by stating:

> We conclude that, where a worker's compensation insurer acts in bad faith in the settlement or payment of compensation benefits, a separate tort is committed that is not within the purview of the exclusivity provisions of worker's compensation law and that the separate tort of bad faith may be alleged and proved in the courts. (Page 620)

The majority recognized the distinction. A cause of action for breach of the collective bargaining agreement would require Respondent, under Section 301, to seek redress under the contract:

> The specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim . . . (Pet. Cert. App. 6)

Respondent's state action did not impinge upon the collective bargaining agreement. Petitioner fails to recognize this independence.

Such independence in fact compliments the bargaining agreement. Respondent, in seeking unpaid disability benefits, would be required to go through the bargained for grievance and arbitration procedures and, if successful, would receive those benefits in addition to possible interest. In seeking redress for the "contemptuous" and "intentional" denial of those benefits Respondent would proceed in the state courts. Thus Respondent's claims proceed arm in arm. Federal labor policy, in respect to bargained grievance and arbitration policies, would provide the means to receive unpaid disability benefits. State policy, in protecting its citizens from unscrupulous insurers who intentionally, and/or recklessly disregard its citizens' common law rights, would provide the means to receive redress for the damages sustained as a result of the non-receipt of disability benefits. The process of making the victim-insured "whole" would be complete.

Petitioner's collective bargaining agreement was not one that contemplated actions in bad faith. The parties merely agreed to provide a means to secure prompt and efficient methods to administer disability payments. On the other hand, Respondent's claim rests upon something not contemplated in the agreement: the state's interest in regulating the manner in which its citizens are treated in respect to their receipt of disability insurance benefits.

The collective bargaining agreement sought *prompt* payment. The majority sought *proper* payment. Section 301 preemption is inapplicable under these circumstances.

B. The Majority Properly Exercized Its Authority Over The Relationship Between Petitioner And Respondent.

The Respondent is asserting a claim that is clearly an insurance-related issue. The bargaining process between A-C and its union, spawned a contract that not only dealt with the matters of wages, hours, or conditions of employment, but further provided for benefits for its employees in the event of their disability. A-C agreed to provide disability insurance to its employees with the option to elect the method under which to do so (J.A. 34).

The majority recognized Respondent's claim as a tort action clearly based upon Wisconsin's interest in insuring a proper relationship beween insurers and insureds. The majority's right to exercise its authority under the circumstances of this case not only came from Wisconsin common and case law, but was also given its "authenticity" by act of Congress.

The McCarran-Ferguson Act, 15 U.S.C. § 1011-1015 gives the majority the clear mandate to action as it did. Section 1012(b) of the Act provides:

> (N)o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

Neither the National Labor Relations Act, nor the Labor Management Relations Act "specifically relate to the business of insurance." The long history of the Act clearly indicates that the maintenance of the fiduciary relationship between insurers and insureds is within the state's jurisdiction. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *Addrisi* v. *Equitable Life Assurance Society of U.S.*, C.A. Cal. 1973 503 F2d 725, certiorari denied 420 U.S. 929, rehearing denied 421 U.S. 922.

The majority found middle ground in granting Respondent's claim. They deferred enforcement of any claim for disability benefits to Section 301 protection while reaffirming the State's interests and rights to promote fair dealing between an insurer and its insured.

As a result, the majority was able to reconcile the potential conflict between national labor policy and that of the McCarran-Ferguson Act.

C. The Majority's Deference To *Garmon* And Its Exceptions Is Material To The Issue At Hand.

Petitioner and supporting amici are attempting to advance inconsistent arguments by avoiding the *Garmon* preemption issue. Petitioner continuously sought and, in fact, secured a ruling based upon *Garmon* in the Wisconsin Circuit Court (Pet. Cert. App. 26-27).

The so-called Garmon doctrine was set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245, (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * * *
>
> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

In *Garmon* the activity in question was peaceful picketing. The court ruled that neither an injunction nor a damage award could be promulgated by a state court because picketing was arguably protected by § 7 or

arguably prohibited by § 8 of the Labor Management Relations Act. It was the court's position that state regulation of such activity would have frustrated congressional purpose by creating the danger of conflict of substantive law procedures and administration. The court further noted that a very fine line existed between whether the particular activity was protected or prohibited under the Act or whether the activity was such as to be subject to state court jurisdiction.

At least until now, Petitioner has asserted that the activity Respondent has complained about was arguably subject to Section 8 of the NLRA and that, as such, was subject to *Garmon* preemption (A-C's Brief to Wisconsin Supreme Court, P. 17). The majority therefore closely examined the issue *Garmon* application.

Exceptions to the *Garmon* rule have been thoroughly discussed by this court. *Vaca* v. *Sipes*, 386 U.S. 171 (1967), is the primary case in pointing out these exceptions to preemption. If "it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB," state courts were free to act. Id. at 179. The application of the preemption doctrine therefore depended "upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." Id. at 180.

Based upon "overriding state interests," state courts have enjoined tortious conduct involving violence and imminent threats to the public order and may award damages for injuries caused by such conduct. *UAW* v. *Russell*, 356 U.S. 634 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656 (1954). This court has also relied on both the "overriding state interest" and

the "peripheral concern" theories in respect to slander or libel during labor disputes. *Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53 (1966); *Letter Carriers Branch 496* v. *Austin*, 418 U.S. 53 (1974).

Both of the above theories were further considered by this court in *Farmers* v. *Carpenters Local 25*, 430 U.S. 290 (1977) in holding that Taft-Hartley does not preempt a tort action by a union member against the union and its officers to recover damages for intentional infliction of emotional distress resulting from outrageous conduct.

The majority position was advanced in reliance on the foregoing. Respondent's complaint not only alleges that Petitioner acted in bad faith but further states that such conduct was "contemptuous" and in "reckless disregard" of his situation (J.A. 4). He alleges that the conduct of the Petitioner was of such a nature as to justify the award of punitive damages.

Farmer not only logically explains why an action for the tort of intentional causing of emotional distress is not preempted, but also provides the ground work establishing the same for the tort of bad faith. *Farmer* has been reaffirmed as the clear cut authority in determining whether a state cause of action should be permitted. See *Sears, Roebuck & Company* v. *Carpenters*, 436 U.S. 180 (1977).

Sears notes that the Courts must be sensitive to the consequences of federal preemption and that *Garmon* is not inflexible.

> While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to

state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. As the Court noted last Term:

> "Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer* v. *Carpenters*, 430 U.S. 290, 302.
>
> Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion.

By applying this criteria to the case at bar it is clear that Respondent's cause of action for bad faith is not preempted. First, the underlying conduct—the knowledge or reckless disregard of a lack of a reasonable basis for continually denying disability benefits—is not protected under the LMRA therefore creating no risk that Lueck's state cause of action could result in state regulation of conduct that Congress intended to protect. The matter is one of peripheral concern. Second, there is an "overriding state interest" in protecting Wisconsin residents from the bad faith of insurers as well as employers engaged in the business of insurance. Indeed, Wisconsin has recognized such a cause of action since 1930. (See *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1 (1930)). The state interest in advancing the bad faith cause of action is one "deeply rooted in local feeling and responsibility." Third, the tort of bad faith is clearly distinguishable from the contractual issues involved herein. As stated earlier, Respondent sues in tort, not assumpsit. There is little risk that the state cause of action would interfere with the effective administration of national labor policy.

The *Farmer* court presented the same reasoning in advancing of Hill's (the plaintiff) cause of action for emotional distress:

> The occurrence of the abusive conduct, with which the state tort action is concerned, in such a context of federally prohibited discrimination suggest a potential for interference with the federal scheme of regulation.
>
> Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would pay no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the "merits" of the underlying labor dispute. *Farmer, supra*, p. 304.

Respondent's argument is the same. The Petitioner's breach of contract may fall under NLRB jurisdiction. However, the Petitioner's bad faith "would play no role in the Board's disposition of the case." Id. at 304.

The *Farmer* Court went even further in clarifying the issue:

> . . . (S)omething more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a func-

> tion of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

By replacing this court's words regarding emotional distress with those concerning the tort of bad faith, it appears that the court's reasoning is on point in respect to Respondent's claim. The Petitioner's contractual breach is not in issue. Respondent ultimately received his disability benefits following grievance procedures on the matter of his termination. His claim in bad faith still survives and is unresolved. Further his claim is clearly a function of the particularly abusive manner in which the handling of his insurance benefits were accomplished. The issue is *the manner in which* the breach was accomplished. Whether the results were in accordance with the contract is immaterial. The materiality lies in whether the common law standard of good faith was followed in respect to the contract.

Respondent's claim rests upon a state cause of action the prosecution of which is of mere peripheral concern in respect to the LMRA. The concern expressed by Respondent's bad faith claim rests not in the breach of the contract but in the fair, just, and humane treatment of an insured by his insurer. The very existence of this tort in Wisconsin illustrates that this concern is deeply rooted in *local* feeling and responsibilities; a concern that the U.S. Congress has not legislated away from its sovereign states. To hold otherwise places all those in situations as those of Respondent in the vulnerable position of having to accept any manner of abusive treatment from an employer without redress. The employer may even eventually honor his commitment to an employment contract but never be amendable to the humane duties which are required in Wisconsin through its promulgation of the bad faith cause of action.

The majority noted the application of *Garmon* exceptions to Respondent's claim and ruled accordingly. The majority further noted, by so ruling, that the cause of action was one the state would not cavalierly defer to federal regulation.

CONCLUSION

For the foregoing reasons, the Wisconsin Supreme Court's decision of January 31, 1984, should be affirmed.

Respectfuly Submitted,

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REPLY

BRIEF

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No. 83-1748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALLIS-CHALMERS CORPORATION,
Petitioner,

vs.

RODERICK S. LUECK,
Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER, ALLIS-CHALMERS CORPORATION

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REPLY BRIEF FOR PETITIONER, ALLIS-CHALMERS CORPORATION

ARGUMENT

I. CONTRARY TO RESPONDENT AND STATE *AMICI*, THE WISCONSIN BAD FAITH TORT IS NOT INDEPENDENT OF A CONTRACT BREACH.

Respondent Lueck and the State *amici* erroneously contend (Resp. Br. 6-9; State *amici* Br. 5-14)[1] that the Wis-

[1] Respondent's Statement of the Case contains several pages of factual allegations which are conceded to be without record support (Br. 2-3). Petitioner believes it improper and unnecessary to attempt to respond to them, and will not. In any event, nothing now claimed by Respondent to have transpired before or after the filing of this lawsuit affects the disposition of the issues presented in this case.

consin tort of bad faith claims handling stands separate and apart from the collective bargaining agreement between Allis-Chalmers and the UAW.

In response to this meritless contention, we join in the cogent analysis set forth in the brief of the AFL-CIO *amicus* at pp. 16-20. That analysis clearly establishes that "a breach of contract is a necessary element of a bad faith claim, and that that tort theory is, at bottom, simply a rule affording extraordinary damages for particular types of contract breaches" (Br. 16).

As a corollary, suits such as Respondent's cannot be resolved without reference to the provisions of the negotiated agreement. Thus, an employee's ineligibility or failure properly to file a claim obviously would constitute good defenses both to the non-payment of benefits or their interruption.[2] Accordingly, even under a tort theory, a plaintiff's damage recovery would depend upon proving compliance with the terms and conditions of the underlying agreement and the employer's breach of such terms. Consequently, the agreement itself must be construed.

Moreover, application of Wisconsin bad faith tort theory dramatically affects the parties' collective bargaining relationship. Those consequences would seriously subvert national labor policies furthered by Section 301. *See* Allis-

[2] State *amici* appear to concede the propriety of such defenses, but seemingly contend that Allis-Chalmers did not raise them (Br. 7). In fact, Allis-Chalmers denied the material allegations of Respondent's Complaint and also averred that the Complaint failed to state a cause of action (Pet. Cert. App. 28-30). More importantly, this case was decided on Aetna's and Allis-Chalmers motions for summary judgment based on preemption principles (Pet. Cert. App. 28-30). As a result, basic questions of Lueck's contractual compliance were not considered by any of the courts below.

Chalmers Br. 19-23; AFL-CIO *amicus* Br. 14-15, 19-20; Chamber of Commerce *amicus* Br. 8-14.

II. *GARMON* PREEMPTION PRINCIPLES ARE NEITHER APPLICABLE NOR CONTROLLING.

Respondent (Br. 11-12) and State *amici* (Br. 14-16) contend that this is not a Section 301 case and, for that reason, it must be governed by preemption principles set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). This contention is clearly incorrect. For even if this were not a Section 301 case, that circumstance alone would not automatically trigger a *Garmon* response. To state the obvious, state laws of general applicability may be brought to bear upon state citizens, including employees, without regard to federal labor law principles. *See Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 193 nn.22,23 (1978).

Further, as pointed out in Petitioner's main brief (Br. 18-19), the threshold test for NLRA preemption is whether the conduct complained of is either expressly or "arguably subject to §7 or §8 of the Act." *Garmon*, 359 U.S. at 236. *See also, Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274, 302, *reh. denied*, 404 U.S. 874 (1971).[3] No Section 7 or 8 activity is involved here. Indeed, State *amici* repeatedly disclaim any relationship between the wrong alleged and the Labor Act (Br. 18, 20-21). Accordingly, NLRA preemption principles are irrelevant to this case.

[3] Another line of NLRA preemption cases, which involves the issue of whether state regulation intrudes on the economic balance of power between employers and unions, patently has no application here. *See e.g., Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148-51 (1976).

Nevertheless, noting that "[s]tates are not ousted of jurisdiction when dealing with only 'a minor aspect' of a matter within the regulatory jurisdiction of the Board" (State *amici* Br. 20), Respondent and State *amici* seek to extrapolate from *Garmon* and related authorities a policy argument favoring the maintenance of the Wisconsin tort. Thus it is asserted that since Wisconsin's interest in the regulation of insurers' relations with insureds is significant but of "only peripheral concern to the NLRA" (State *amici* Br. 19), an accommodation should be struck between state and federal law permitting the maintenance of this tort action (State *amici* Br. 18-24).

The fundamental fallacy in this analysis is its focus on NLRA preemption principles as the source of *all* federal labor law and the federal interest. Clearly, because this case neither falls within "the regulatory jurisdiction of the Board" nor impinges on any statutory language or policy embodied in the *National Labor Relations Act*, a comparison between the relative importance of state and federal interests based on the latter Act's policies is defective from the outset. Necessarily the correct equation is between the interests of Wisconsin and federal interests as embodied in Section 301 of the *Labor Management Relations Act*, the only relevant federal legislation.

Moreover, even were the *Garmon* analysis somehow applicable, no overridingly significant state interest would appear to be present here. Thus this Wisconsin tort does not seek to protect against conduct of such character and importance—*e.g.*, violence, threats of violence, trespass, malicious libel—as has been considered by this Court to be "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244.[4] At most, the Wisconsin bad faith

[4] *See also*, cases discussed in *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61-62 (1966).

tort stands as a relatively new, judicially created concept, probably only of marginal interest to most Wisconsin citizens.[5] Certainly it is not comparable to long-established state interests in the protection of free speech, property, or the free flow of commerce, far more compelling interests which this Court nonetheless has held preempted by the NLRA. *Id.* at 243 n.1; *See also, Local 24, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Oliver*, 358 U.S. 283 (1959), and *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252 (1964).

Accordingly, even if a *Garmon* analysis were appropriate, preemption still would result.

III. RELIANCE ON THE McCARRAN-FERGUSON ACT IS MISPLACED.

Both Respondent (Br. 10-11) and the State *amici* (Br. 21) turn to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, in support of Lueck's position. That reliance is misplaced.

It is clear that the purpose underlying the McCarran-Ferguson Act is to leave the regulation of insurance matters to the states and to exempt the business of insurance from federal antitrust regulation where that business already is regulated by the state. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, *reh. denied*, 441 U.S. 917 (1979); *Hahn* v. *Oregon Physicians Service*, 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3115 (1983); and, H.R. Rep. No. 134, 79th Cong., 1st Sess., *reprinted in* 1945 U.S. Code Cong. Serv. 670-72. In part the statute reads:

[5] Heretofore this tort has been applied only to insurance companies' obligations. Here, of course, Allis-Chalmers is not an insurance company but an employer which provided a negotiated fringe benefit and in doing so "acted as a self-insurer" (Pet. Cert. App. 2).

> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . .

Thus, the very language of the statute demonstrates its inapplicability. There is no state "enactment"[6] remotely involved in this case. No act of the Wisconsin legislature was being construed by the court below.

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[6] State *amici*'s suggestion that subsequent to this lawsuit the Wisconsin legislature statutorily preempted claims such as Respondent's (Br. 24-25) is misleading and incorrect. The legislation in question, Wis. Stat. § 102.18 (bp) (1982), became effective November 28, 1981, *prior* to the filing of this action. Moreover, the statutory section provides for damages for non-payment of amounts due under Wisconsin's Worker's Compensation Act of which it is part. It does not apply to Respondent's claim which arose from a non-occupational injury (Pet. Cert. App. 2). *Jadofsky* v. *Iowa Kemper Ins. Co.*, 120 Wis. 2d 494, 355 N.W.2d 550 (Ct. App. 1984), cited by State *amici* (Br. 25), also is completely inapposite.

CONCLUSION

For the reasons stated herein and in our main brief, the Wisconsin Supreme Court's decision of January 31, 1984, should be reversed and its judgment vacated.

Respectfully submitted.

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